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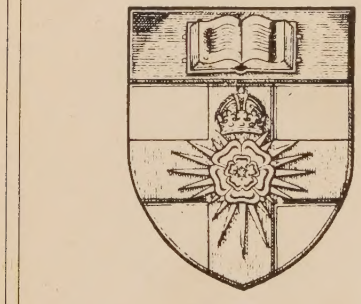

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CORRIGENDUM.

Page 531, line 12 from foot, *delete* "and the learned Judge certified for a special jury."

MEMORANDUM.

During the Michaelmas Sittings the Right Honourable Mr. Justice O'Brien died.

CASES

DETERMINED BY

THE QUEEN'S BENCH DIVISION

OF

THE HIGH COURT OF JUSTICE IN IRELAND,

AND BY

THE IRISH LAND COMMISSION,

AND ON APPEAL THEREFROM IN

THE COURT OF APPEAL,

AND BY

THE COURT FOR CROWN CASES RESERVED.

1899.

ABERDEEN GLEN LINE STEAMSHIP CO. *v.* MACKEN. THE SS. "GAIRLOCH" (1).

Appeal.
1897.
Nov. 16, 17, 19.

Ship—Charter party—Demurrage—Custom of port of Dublin—Reasonable despatch—Appeal—Jurisdiction—Questions of fact.

There is no established custom of the port of Dublin to discharge cargoes of steamers at an average rate of 350 tons per day, calculated on the whole period of discharge. A charter-party which provides that the cargo is "to be discharged as customary for steamers at port of discharge" is in effect an open charter-party, under which it is the right of the ship and the duty of the consignee to have the cargo discharged with reasonable despatch. The giving of reasonable despatch is a requirement which the consignee is bound to satisfy *de die in diem*. He cannot, by working *extra* hard on one day, entitle himself to idle on another day; and if he has done more than an average quantity at the beginning of the discharge, he cannot on that account relax the measure of reasonable diligence towards the end.

(1) Before FITZGIBBON, WALKER, and HOLMES, L.JJ.

Appeal. 1897.

The principles discussed, which guide the Court of Appeal in dealing with the findings of fact arrived at by a Judge sitting without a jury in the Court of first instance.

THE SS. GAIRLOCH.

APPEAL by the plaintiffs from the judgment of Mr. Justice Johnson (sitting without a jury) refusing to award demurrage for the detention of their steamer the "Gairloch" in the port of Dublin. The facts are fully stated in the judgment of Lord Justice Fitz Gibbon.

Barton, Q.C., and *Blood*, for the appellants.

Serjeant Dodd, and *S. L. Brown*, for the respondent.

Nov. 19.

FITZ GIBBON, L.J.:—

This action was brought for demurrage of the plaintiffs' ss. "Gairloch," in the discharge of a cargo of wheat consigned to the defendant from Buenos Ayres to Dublin, where the vessel arrived on Saturday, April 11, 1896. The discharge was completed on Tuesday, April 21. The claim originally made was for two days demurrage for Monday and Tuesday, April 20 and 21; but by amendment a further claim for a third day was made. The plaintiffs have throughout contended that the vessel ought to have been discharged at latest on Saturday, April 18. The amendment was intended as a claim for Sunday, April 19, as a demurrage day, which it would be if the vessel ought to have been cleared on Saturday night. The rate of demurrage is fixed by the charter-party at 4*d.* per gross registered ton per day, and the vessel being chartered as of 2173 tons measurement gross, the liquidated demand amounts to £36 4*s.* 4*d.* per day. The Judge in Admiralty dismissed the action with costs, and the plaintiffs have appealed. It is now for us to decide whether the plaintiffs were entitled to three days demurrage—namely, for Sunday, Monday, and Tuesday, April 19, 20, and 21—to one day's demurrage for the Tuesday—or were not entitled to anything.

The charter-party, dated December 31, 1895, contains the following provisions as to lay days and demurrage:—"Lay days: cargo to be loaded at the rate of 200 tons per weather working day, Sundays and holidays excepted, and all time on demurrage

over and above said laying days shall be paid for by the charterers or their agents to the ship at the rate of 4*d.* sterling per gross register ton per day demurrage. Demurrage at above rate shall be payable for any detention in taking delivery of cargo at port of discharge, the same having to be discharged as customary for steamers at port of discharge." The construction and effect of these clauses were discussed in argument; although, upon the facts and in result, the matter discussed does not materially affect the rights or liabilities of the parties, I may state our view of the construction of the charter-party. No definite time is fixed for the discharge, either by number of lay days, or by quantity to be discharged, and the demurrage clause which stipulates that the discharge is to be "as customary" differs, in this respect, from the cases to which we have been referred, in which the words "as customary" were held to be restricted to the manner of discharge only. The manner of discharge in many cases must, and in all cases may, affect the time; for example, such a custom as was proved in the *Berwick Case* (1) to prevail at Limerick, forbidding the use of steam winches, would necessarily increase the time occupied. In the present charter-party, the mention of "detention," and the form of the clause, make it difficult to restrict it to the mere manner of getting out the cargo; and we assume, in favour of the defendant, that, under its terms, he might and could rely upon any custom of the port of Dublin which, either directly or indirectly affected either the time or the manner of discharge. We also assume, in his favour, that "custom" in such a case is not restricted to a custom strictly so called, which must be so proved as to become an implied term of the contract, but includes any habit or general practice prevailing so generally at the port of discharge as to bind both parties and affect the ship and cargo, even though nothing may have been known of it when the charter-party was signed. But such a custom, in order to prevail, must be proved, certain, and reasonable. The custom alleged by the defendant in this case was a custom, in general terms, to discharge the cargoes of steamers in Dublin at an average rate of about 350 tons per day, calculated on the whole period of discharge.

(1) Not reported.

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The evidence offered in support of this alleged custom went no farther than to show that, taking a number of steamers of different construction and capacity, the facilities for whose discharge, and the circumstances of whose discharge, were unknown, the cargoes were taken out at a rate averaging, upon the whole, somewhere about 350 tons per diem. Such evidence falls wholly short of establishing any custom which could affect the ordinary common law right of the owners of the "Gairloch," and therefore this charter-party appears to us to be in effect an "open charter-party," under which it was the right of the ship, and the duty of the consignees, to have the cargo discharged with reasonable despatch, having due regard to all the circumstances of the port, ship, and cargo, without exceptional exertion on the one hand, and without unnecessary delay upon the other. In ascertaining what was reasonable despatch, we are entitled to have regard to all the circumstances—including the time proved to have been required to do similar work in similar cases, the size and construction of the particular ship, the nature and condition of the cargo, the mechanical appliances, and the manual labour available, but, above all, to what is the best and most direct evidence, the proof of what was actually done, from day to day, in discharging the "Gairloch" herself.

The plaintiffs, as owners, engaged Mr. Mackenzie of Dublin as their agent. He employed a stevedore who undertook to supply men to give delivery of the cargo as fast as the receivers could take it. The stevedore's duty, therefore, on behalf of the plaintiffs, was to put the cargo over the rail as fast as the defendants would receive it, beginning as soon as was reasonably possible after the vessel was berthed, and continuing the discharge with reasonable and steady diligence, from day to day, until completed. It is undisputed that the number of gangs employed upon each day was fixed by the consignees, and therefore that the rate of discharge was really regulated by them, except on the last two days, as to which there is some controversy which must be separately considered. Though the vessel was berthed at 1 a.m. on Saturday, April 11th, she was not cleared at the Custom House until towards noon, and the ship's log contains an entry that at noon the hatches were all surveyed and passed. It is a question of fact whether,

having regard to its being Saturday, to the impossibility of engaging gangs the night before, when the vessel had not arrived, and to all the circumstances, even the note in the log that it was showery weather, it was reasonable to put off the commencement of the unloading until Monday morning. The captain telegraphed on Saturday to the plaintiffs, "arranged discharging 6 Monday morning seen Mackenzie"; and Mackenzie wrote on Monday—"discharge commenced this morning." There is thus evidence of acquiescence by the plaintiffs, and of arrangement by their agent; and, as an appellate tribunal, we certainly cannot differ from the conclusion that the postponement of the commencement of the discharge to 6 o'clock upon Monday morning was not, in itself, an unreasonable delay. It is, however, an element in the case which would make the obligation to work with reasonable despatch throughout the following week more manifest, and it also made it especially incumbent upon the defendant to go to work on Monday morning with a full complement of men and appliances for discharging the cargo. The cargo was in four holds, each having one hatchway rigged with a steam-winch, and two gangs could work at each hatch. According to the bill of lading, the cargo ought to have contained 2780 tons. It is in evidence that it weighed out only 2715, or, according to the log, 2731. The defendant in his evidence states that he did not become aware that the cargo was short until about mid-day on Monday, April 20th, and therefore his duty of taking discharge should be measured until then by a belief that the ship contained 2780 tons. Once and for all I give the figures which show the work done on each day:—

Date.	Winches.	Gangs.	Tons.
Monday, April 13,	two	four	318
Tuesday, ,, 14,	two	four	314
Wednesday, ,, 15,	three	six	494
Thursday, ,, 16,	four	seven	545
Friday, ,, 17,	three	five	411
Saturday, ,, 18,	three	six	450

Thus, in six days 2532 tons were discharged, leaving on Saturday evening, April 16, a supposed quantity of less than 250 tons, but in fact there then remained in the ship only 183 tons. These

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were discharged by four gangs working two winches, on part of Monday, April 20, taking out only 156 tons; and on Tuesday, April 21, two gangs working two winches took out the remainder, about 27 tons, and cleared the ship before noon. As I have said, the plaintiffs have throughout contended that, with reasonable despatch, the vessel might and ought to have been cleared in six days, and cleared on Saturday, April 18. The defendant, on the other hand, has with equal persistency maintained that they were entitled to spend eight days over the discharge, and therefore that they were within their right in not clearing the ship until Tuesday, April 21. We must first see whether either of these contentions has been made out, and if not, it will still remain to be determined whether the delay from Monday to Tuesday was or was not consistent with reasonable despatch, always bearing in mind that the Court below has decided upon this question of fact in favour of the defendant. Throughout the examination of the evidence, we must always keep the fact before us that the defendant has admitted that there was no default or delay on the part of the ship, at least until Monday, April 20, and that no evidence has been offered of any difficulty in obtaining any labour required. On Thursday, the only day upon which all four winches were worked and seven gangs were employed, 545 tons were discharged, while on Wednesday and Saturday, when three winches and six gangs were at work, 493 and 450 tons were taken out. On Friday three winches and five gangs discharged 411 tons. The figures show, with remarkable uniformity, that each gang turned out, as nearly as possible, 78 tons per day during the week. Speaking for myself, if I had been in the Court of first instance, and if the question of reasonable despatch was to be determined by the figures, without regard to the sort of *argumentum ad hominem* supplied by the conduct of Mackenzie and the correspondence with the plaintiffs, the weight of the evidence would establish that it was reasonable to require the consignees to take delivery each day, from certainly not less than three winches, each worked by two gangs, and if so, the average rate of discharge ought not to have been less than 475 tons per day, and the ship would have been easily cleared upon Saturday. Whether this conclusion is displaced, or is so far questionable that we ought not, upon appeal, to

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disturb the decision of the Court below to the contrary, mainly depends upon a consideration of the oral evidence and of the correspondence. On Monday the 13th, Mackenzie wrote to the plaintiffs—"Discharge commenced this morning, but owing to the day being wet, less was discharged than we expected," and next day the captain and Mackenzie both informed the plaintiffs that 300 tons only had been discharged. On Tuesday the plaintiffs got a charter for the ship, and immediately pressed to have her cleared by Saturday, telegraphing on Tuesday evening—"Boat chartered Monday loading must sail Saturday." Mackenzie and the captain at once saw the defendant, who immediately asserted his claim to keep the ship for eight days, and not to discharge more than 350 tons daily "as customary." The captain replied to the plaintiffs the same evening—"Seen consignees, fear difficulty clearing Saturday early; accept cost storing cargo £80, otherwise refuse, and subject reply morning early." On the following morning, Wednesday the 15th, the plaintiffs telegraphed again—"When will discharge finish without despatch money? What can we demand under charter? £80 absurd for Saturday. What quantity discharged yesterday? Claim 500 daily." The captain replied "Discharge expect finish Tuesday night, charter custom port 350 tons; 314 discharged yesterday, except arrangements made early, fear impossible finish Saturday; consignees willing you pay extra storage, if cannot agree lump sum." This claim for storage seems to me to be not only legally untenable, but to be almost fatal to the defence. Using the ship as a store, for convenience of purchasers of the cargo, and at the same time offering to put the cargo into a store, if paid for doing so, is inconsistent with reasonable despatch in clearing the ship. The plaintiffs replied at 11.50 a.m.:—"300 daily with four winches absurd; would give £10 finish Saturday, or must get demurrage association take matter up, as hold time expires then." In thus referring to the four winches, and truly saying that, if they had been working, 300 tons would have been "absurd," the plaintiffs took up right ground, and if they had unequivocally adhered to this position to the end, and were not embarrassed by their agent's acts, I would hold the weight of evidence to be entirely in their favour upon the issue that 350 tons per day was not a reasonable

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rate of discharge for their ship with four winches; that it was not reasonable to work only two winches and four gangs, and that there was an unreasonable want of despatch upon Monday and Tuesday the 13th and 14th, to the extent of at least 150 tons, and to the extent of at least an additional winch, and two additional gangs, upon each of those two days. If three winches and six gangs had worked on those days, the vessel would have been clear on Saturday evening. But the negotiation for despatch money continued. Mackenzie telegraphed again on Wednesday:—"350 rate other steamers discharged. No clause in charter stipulating deliver as fast as can deliver. They refuse clear Saturday except arrangements made"; and on the same day he wrote full details, saying:—"Receiver says you may take the case up if you like, and he absolutely refuses to finish this week unless the storage is paid." In my view this claim for storage shows the defendant to be in default, unless he proves that it required exceptional despatch to discharge all the corn for which the storage was claimed. The vessel was moored opposite the stores into which the cargo could have been carried, but it is proved that the consignees really insisted on having the ship as a store for the eight days, in order to try to sell the unsold portion of the cargo, and to deliver it to the purchasers direct, ex ship, to save storage. They can have no such right in law. Reasonable despatch as against the ship-owner cannot be measured by the ability of the consignee to dispose of the cargo to purchasers, and, accordingly, the motive of the defendants appears to be as inconsistent with their duty to the ship, as the alleged custom to limit the rate of discharge for all steamers to an average of 350 tons is untenable. On Wednesday morning, however, the despatch was greatly increased, and the log corroborates the other evidence in showing that, for the rest of the week, the discharge proceeded "as fast as possible," or at least "as fast as possible with the number of gangs engaged." The only suggestion of further default, up to Saturday, arises on the reduction of the number of gangs to five on Friday, but this was to some extent compensated by the employment of seven on Thursday, and is not sufficient in itself; besides, a sixth gang working on Friday would not have been sufficient to clear the ship on Saturday. It is not necessary to go much into detail through the cor-

respondence during these four days. On Thursday the 16th, the plaintiffs telegraphed and wrote, giving notice that the time was to expire on Saturday. On Friday they gave formal notice that demurrage would be claimed after Saturday. In reply, the defendant wrote:—"This cargo has custom of port for discharge, which leaves her time up on Tuesday when steamer will be cleared, and we decline to accept any other terms for discharge." But on Friday morning at 10.50 a.m. the plaintiffs telegraphed:—"If 500 discharged to-day to-morrow, only 280 left for Monday. Will give £15 clear Saturday. This without prejudice demurrage claim if kept later." This telegram, though without prejudice, cannot be entirely ignored, when taken in connexion with Mackenzie's action, when we come to consider whether we can disturb the judgment appealed from as to the previous Monday and Tuesday. Mackenzie replied by letter, pointing out that the owners were to a certain extent to blame in agreeing to allow any such clause in the charter as custom of the port, as a stipulated quantity should be mentioned, and so the week ended. As there was not any evidence of material default from Wednesday to Saturday inclusive, we are forced back to the question whether there was actionable default on the previous Monday or Tuesday; otherwise, though only about 200 tons remained on board on Saturday night, demurrage cannot be recovered for Sunday or Monday. For myself I repeat that the weight of the evidence, to my mind, establishes such default, and I cannot find sufficient evidence that the plaintiffs waived their right to insist upon it; but on the other hand, it was only on Tuesday evening, when the new charter stimulated the plaintiffs into activity, that they first definitely insisted on the vessel's being cleared by Saturday night, and on Friday they offered £15 to have it so cleared. Mackenzie's action, moreover, tells against them, and is evidence of what he regarded as "reasonable despatch." He knew, both on Monday and on Tuesday, that only two winches and four gangs employed were at work, and neither he nor the captain appears to have remonstrated on the spot at the time, as they ought to have done, if they saw on Monday morning that reasonable despatch was not being given. The very most that I can say for the defendant, under those circumstances is, that I am not forced to dissent from the conclusion

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that we ought not to reverse the decision of the Court below, especially having regard to the decision of the majority of this Court in the case of the "Benwick," which was pronounced under similar circumstances. But even if the judgment of the Court below is allowed to stand, so far as it refuses to allow demurrage from Saturday the 18th, and even if an actionable want of reasonable despatch has not been conclusively proved as regards the 250 tons which were then believed to remain undischarged, we must still deal with the claim for Tuesday, April 21. On Monday morning, the 20th, the parties were in every sense "at arms length." A formal claim for £34 16*s.* 8*d.* for the Monday's demurrage, 2090 tons at 4*d.*, was delivered on that morning. It was at once repudiated by the defendant, who repeated that "lay days of this steamer do not expire until to-morrow." The claim was again made on and for Tuesday, and was met by the answer that the consignees "discharge the steamer according to the custom of the port." We have therefore to decide what was the right of the ship on that Monday morning, as against a claim resting on an untenable ground. She was then believed to have on board less than 250 tons; before mid-day the quantity was known to be short, and it turned out to be 183 tons only. Was it "reasonable despatch," on that Monday morning, and under such circumstances, to put only two winches and four gangs to work, or to allow them to leave before the ship was clear? We cannot hold that it was. No explanation whatever has been offered, either of the fact that only two hatches were worked that day, or that the work was stopped early in the day. The log shows that they finished discharging holds Nos. 2 & 3 at 4 p.m. on that day; the oral evidence is that they left off working at 2 o'clock. This mode of working is accounted for by the defendant himself, in a way which is fatal to his defence to the claim for demurrage. He had sold the residue of the cargo to a purchaser, to whom he wanted to deliver it direct into a schooner alongside the "Gairloch." He kept the "Gairloch" for that purpose, thus making her a store for the convenience of the schooner, and the evidence conclusively shows that he thus delayed the completion of the discharge until Tuesday, for his own pecuniary profit, and under his claim of right to do so "as customary." At 12 o'clock on Monday, he ascertained that the cargo

was short, and, whether we take the residue of the cargo at 250 or at 183 tons, there was no excuse for spending two days in discharging it. If four or even three hatches had been worked on Monday morning, or even if the four gangs had worked all day on Monday, the vessel could easily have been emptied before that evening. It is true that an attempt was made at the last moment in the Court below, and repeated here, to explain the failure to complete the discharge on Monday, by delay on the part of the ship in separating the damaged from the good corn, and in sweeping the holds, before getting out the tailings of the cargo. But, without going so far as to say that this case is an afterthought, it is inconsistent with the admissions made on the part of the defendant, and with the evidence of the stevedore and others. It is inconsistent also with the fact, which is abundantly proved, that, from start to finish, the defendant put forward, insisted upon, and carried out, the contention that, by a custom of the port of Dublin, he was entitled to eight lay days for discharging the "Gairloch." These eight days he occupied accordingly, but he has failed to give legal evidence of any such custom, or to show that such a custom could apply, either to all steamers irrespective of circumstances, or to such a steamer as the "Gairloch." Therefore the plaintiffs are entitled to judgment in the action, with costs below and upon appeal, for, at the very least, one day's demurrage, namely, Tuesday, April 21, at the stipulated rate, amounting to the sum of £36 4*s.* 4*d.*

Though I am yielding my own opinion, in deference to the Court below, upon the question of fact with respect to the claim from Saturday to Monday, we are all agreed upon the principles of law applicable to the case, and I conclude my judgment by now reading some passages from the judgments in the case of the "Benwick." In that case both parties tried, and failed, to prove a custom to discharge a fixed average number of tons per day, and the defendants there, as here, tried and failed to establish the principle that discharging more than the alleged quantity on one day would entitle them to discharge less upon another. The judgments on those points, therefore, apply to the present case with equal force, and the passages which I shall read may be useful in guiding merchants and ship-owners in future as to the opinion of this

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Court upon a defence which rests upon such a custom as is alleged by the defendants here.

The Lord Chancellor, now Lord Justice Walker, said, "There being no custom, and the charter-party being an open one, the legal rights of the ship-owner were to have the cargo discharged in a reasonable time. The word 'reasonable' raises all surrounding circumstances, and for these circumstances, and having regard to the events which actually happened, I do not think the merchants taking discharge were responsible. I do not agree with Mr. Ronan's contention that reasonable diligence could be ascertained by bulking together all the conduct and acts of the merchants spread over the whole period of delivery so as to permit of exceptional despatch for one part of it to be set off against idleness during another part. That is not the sort of reasonable diligence which the ship-owner is entitled to expect from the merchants."

The Master of the Rolls concurring in the judgment of the Lord Chancellor said, "I agree with the Lord Chancellor, that if the learned Judge had said that he thought there was one day's delay, or perhaps two days delay, for which the merchants were answerable, it would have been difficult for us to have differed from him. But having come to the conclusion that the evidence was in favour of the defendants in the action, I do not see any reason to differ from the learned Judge. There is just one matter, which might be regarded as a point of law in the case, on which I should like to say a word. It was pressed strongly upon us, particularly by Mr. Ronan, that the merchants in discharging cargo, if they exhibit extraordinary diligence in giving what I may call extra despatch on one or two days, were entitled to claim the benefit of that as a sort of set-off against what would be otherwise negligence and delay in reference to the discharge of the rest of the cargo. Now neither Mr. Ronan nor any of his colleagues was able to show any authority for that proposition, and I do not think we ought to accept it as being law. I think what the ship-owner has a right to insist on is reasonable discharge during the entire time. I do not mean to say if the merchants were prevented from giving large work by unavoidable circumstances next day, they might not reasonably anticipate that by extra work the day before; that is not the case here; it is not suggested; and it would be a

dangerous doctrine to say that admitted negligence without cause could be excused by previous over exertions."

I said "there is another matter of principle, on which the Master of the Rolls has expressed a clear opinion, in which I entirely agree. This ship was entitled to be discharged as upon an open charter-party with reasonable despatch. Reasonable despatch appears to me to be a requirement which the consignee is bound to satisfy *de die in diem*. He cannot by working extra hard on one day entitle himself to idle on another day, and if he has done more than an average quantity at the beginning, he cannot relax the measure of reasonable diligence towards the end. No doubt if his efforts to discharge a very large quantity on one day threw a heavier burden of labour upon him in storing or disposing of that corn on another day, he might be exercising 'reasonable despatch' on both days, though a smaller quantity was taken out of the ship on the day when he was occupied in the storing of what had been taken out on the day before."

And I added on the other point, "We are driven back to the question of fact, upon the balance of the evidence, what is the reasonable quantity which ought to be discharged from such a vessel as the 'Benwick,' under ordinary circumstances, and was the quantity discharged in this particular case less than that ordinary quantity, and if so, how far, and why, and through whose fault, was it short? I fully and strongly feel the inexpediency of reversing decisions upon questions of fact, even where there is an appeal on fact as well as on law. But this is an appeal from a single Judge who has no exclusive jurisdiction, such as a jury has, upon matters of fact. Unless the finding, in the judgment of the appellate Court, is plainly against the weight of the evidence, we ought not to come to an opposite conclusion, but it is our duty to do so, if the evidence coerces our judgment so to do."

I then proceeded to analyse the evidence in that case to show why, as a juror, I should have come to a different conclusion from that to which the learned Judge who heard the case had come. But in conclusion I said, "I believe we are all of the same opinion with respect to the principles involved in the case: in the two matters of the rebagging and the proper mode of calculating reasonable

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despatch, matter of principle is involved upon which it is satisfactory that the Court is entirely agreed."

Finally, Lord Justice Barry said, "As to the custom upon which reliance was placed—it seems more or less imaginary. I do not think they know exactly what the meaning of a custom is when they talk about it; whether or not a custom exists is a question of fact. As regards all the questions of law, we are all agreed, and it is not necessary to say anything more on these."

WALKER, L.J.:—

The first question which arose in the Court below was as to the construction of this charter-party, which provides that the steamer is to be discharged as "customary" for steamers at the port of discharge. There are a number of cases in which the word "customary" has been held referable to the manner of the discharge only and not to the time occupied thereby, save so far as the manner may influence the time of the discharge. And the learned Judge who tried the case below decided that the principle of those cases applied to the present. That might be a nice and interesting question here, seeing the way in which "detention" is coupled with "customary," but it is unnecessary to express any opinion about the matter, because, as Serjeant Dodd himself confessed, no decision of ours upon the point would do the defendant any good, as he had not proved any custom.

There is no proof of a custom to deliver 350 tons only each day. Indeed I can hardly imagine how there could be such a custom. Steamers vary so enormously in their capacity and in the machinery and appliances for the discharge of cargo, that practically there would be a custom for each steamer. Much less is there proof of a custom to deliver 350 tons a day as an average. It is, however, quite possible that delivery of 350 tons might generally be taken as reasonably sufficient per day to satisfy the requirements of ordinary diligence, having regard to all the circumstances of the case.

We have already in the Limerick case expressed our opinion as

to the unsoundness of the argument that what would amount to reasonable diligence was to be ascertained by striking an average between days on which a great deal of work was done and those when practically nothing was done, and we adhere to that opinion.

But Serjeant Dodd presented a thoroughly legal argument when he undertook to satisfy the Court that the discharge in this case was *per diem* sufficient to fulfil all the obligations of reasonable diligence, and said that, the Judge below having so found, the Court of Appeal should not question his finding of fact. In following Serjeant Dodd's argument I shall first take the case up to Saturday, April 18. There was a legal obligation to work on the first Saturday, April 11, so far as time allowed: but there does appear to have been a sort of arrangement that the discharge should not begin till Monday. That is the natural inference, at least, to draw from the telegram sent on Saturday, "Arranged discharge 6 o'clock Monday morning," and it is strongly confirmed by the fact that the first claim for demurrage is for Monday, April 20.

Then there was acquiescence by the plaintiffs in the discharge made on Monday and Tuesday, April 13, 14, though probably more might have been done on those two days; and what caused the complaints and induced the pressure was the telegram of Tuesday from the owners—"Boat chartered Monday, must sail Saturday." Before that was answered, Macken must have seen Mackenzie. Because his reply is "Tuesday 6, 8 p.m. Seen consignees, fear difficulty clearing unless £80 paid." This £80 was for the storage which Macken claimed if the ship was not to be detained for what he considered to be her full time. Then on Wednesday began the controversy of letters and telegrams. The claim on one side was that they were entitled to keep the ship till Tuesday; on the other side, that the discharge must finish on Saturday. Thus on Friday, April 17, Macken's letter insists that he has till the following Tuesday. The owners, on the other hand, by their telegram of April 15, ask "When will discharge finish without despatch money, claim 500 daily," and their agent by telegram replies "Discharge expect finish Tuesday night; charter custom port 350 tons." The same day the owners reply "300 daily with four winches absurd; will give £10 gratuity finish Saturday, as

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hold time expires then," and the agent answers back "No clause, deliver as fast as can be." These telegrams plainly show the ground taken all through by the parties. Seeing that the discharge on Wednesday, Thursday, Friday and Saturday, was reasonable, and that there was acquiescence as to the number both of gangs and winches employed, and as regards what was done on Monday and Tuesday, and that there was apparently an agreement that a start should not be made on the first Saturday, I am not prepared to differ from the learned Judge below in his finding that there was reasonable diligence up to Saturday, April 18. This brings us to what happened on Monday, April 20.

In order to test whether there was reasonable diligence on the defendant's part in stopping early on Monday, and going into Tuesday, as they did, it is material to ascertain the state of mind of Macken.

The state of mind of Macken is clear. He says, "I had to keep the vessel for convenience of buyers, the grain was sold, and the buyers had the full eight days. I was using the ship for the eight days to save myself the cost of storage." "The work was not stopped deliberately on Monday. I believe the work stopped on Saturday to deliver to the schooner on Monday and Tuesday." And further on he said to the Judge, "I ascertained about twelve on Monday, that the cargo was going to turn out short of the bill of lading." We are asked now to say that the merchants were willing to discharge on Monday, and were unable. Did they try? Macken knew the cargo was short at 12, therefore it was not the ideal 65 tons that stopped them working: and when Tuesday came what was left over for that day proved only nominal work which, as a fact, could have been done twice over on Monday. There is a great controversy, and in the result a most material controversy, as regards what occurred on Monday. We know what Macken's state of mind was on the Saturday evening, and we have seen what his contention was all through, and we know the schooner was to receive the corn on Monday and Tuesday. So Macken expressly states.

On Saturday there was left 182 tons odd in the ship with a supposed sixty-five making as was thought 247. Why did not the merchants order six gangs for Monday, same as they did on Saturday?

If they had would not the whole have been cleared? Two o'clock came and the men were taken off. Why was the work stopped at 2 p.m.? It is now said there was delay arising from the damaged grain. But this I think is an after-thought. I refer to Macken's letter 20th April, a contemporaneous document. In it he says, "the lay days will not expire until Tuesday": and there is no hint of a difficulty arising from damaged grain or want of sweeping. He made a consistent case all through before the case came into Court and while in it, alleging a right to detain the ship till Tuesday. The damage to the grain was only relied on at the end of the whole case. Lawlor says that they stopped work at two o'clock on Monday. "Nothing that I know prevented what remained in the ship being taken out that Monday evening between 3 and 6." I am satisfied that the non-clearance on Monday was owing to the honest but unfounded idea of right on which Mr. Macken had acted all through, and that we must treat all non-delivery after Monday evening as inexcusable and creating a claim for demurrage.

I concur, therefore, that there should be judgment for the plaintiffs for one day's demurrage.

HOLMES, L.J.:—

The legal questions suggested on the opening of this case have disappeared in the course of the argument.

It is now admitted that there is neither custom nor established practice governing the time to be occupied in discharging the cargo of steam boats in the port of Dublin; and therefore it is unnecessary to consider whether the word "as customary" in the 27th clause of the charter-party relate to the rate of discharge.

The measure of obligation is that the ship owner and the merchant must each do his part with reasonable diligence. From neither is there required the greatest despatch possible, nor can either fulfil his duty by merely reaching the standard of an imaginary average.

The facilities afforded by the ship's machinery, the condition of the labour market, the state of the weather, in fact all attendant and surrounding circumstances, must be taken into account with

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the result that no general rule applicable to all cases can be laid down.

When a Judge after trying a case upon *vivâ voce* evidence comes to a conclusion regarding a specific and definite matter of fact, his finding ought not to be reversed by a Court that has not the same opportunity of seeing and hearing the witnesses unless it is so clearly against the weight of the testimony as to amount to a manifest defeat of justice. The same rule does not apply, at least in the same degree where the conclusion is an inference of fact. It often happens, as in the present instance, that the decisive finding is a deduction from facts hardly disputed or easily ascertained. In such a case the appellate tribunal is in as good a position for arriving at a correct conclusion as the Judge appealed from, and it would be an undue restriction of the functions of the former if it were to hold itself bound by what has been found by the latter. Of course the view of the Judge who tried the case is of the greatest weight, and for my own part I would only depart from it with much hesitation when, as here, we have not been furnished with a report or note of the judgment appealed from.

The plaintiffs' vessel was ready for discharge between ten and eleven o'clock on a Saturday. Several hours of the working day still remained, and no reason is given for the merchant postponing operations till the following Monday. It is to be observed, however, that this delay was not claimed by him as arising from a custom of the port, or as a thing to which he was entitled. It seems to have been a matter of convenience only, and when I find that both the master and the ship's agent conveyed to the owners by their telegrams that they had acceded to this arrangement, there is, I think, strong evidence that it was considered by all the parties who knew the circumstances that no real progress could be made in what remained of Saturday.

I therefore hold that up to Monday morning there was no default on the part of the defendant. The discharge of the ship was, by the terms of the contract, to be a joint operation, and accordingly the stevedore Geoghegan was employed to deliver on behalf of the owners, and the Granaries Company, represented by Hammond, to receive on behalf of the merchant. It is clear from the evidence that there was no want of labour, and that Geoghegan was all

through the period of the discharge in a position to deliver what the merchant was willing to accept. The latter, however, believed that the rate of discharge was by the custom of the port fixed at 350 tons a-day, and having calculated that he was entitled to eight working days to take delivery, he made his arrangements with his customers on this basis. There were four holds in the vessel with steam winches for the working of each of them, and on both Monday and Tuesday grain was taken from only two holds. Unless this can be accounted for in some way, it seems to me a want of reasonable diligence, and I doubt if there is anything to account for it except the mistaken idea that the delivery was to be distributed over eight days. I do not attach much importance to the acquiescence of the master and agent during Monday and Tuesday. They were silent, not because they considered the despatch reasonable, but because they believed that it was fixed by custom. The suggestion that the beginning of the discharge is necessarily slow has little tangible evidence to support it, and affords no explanation of confining the delivery to two holds. Still there is one point to which weight may have been attached by Mr. Justice Johnson. The discharge on the two first days fell far short of the 350 tons per day assumed to be the proper amount; and yet until the receipt on Tuesday evening of the telegram announcing the new charter-party there was no remonstrance from the master. I take this as evidence that he saw some reason for a short delivery up to that time; and therefore I accept, although with considerable difficulty, the view that until then the defendant was in no default. For the four remaining days of the week, the evidence shows reasonable diligence on the part of the merchant. The despatch was not the greatest possible. It was assumed on all sides that the vessel could have been cleared on Saturday evening, otherwise there would have been no meaning in the negotiation about the £80. But excessive diligence could not be claimed; and under ordinary circumstances the progress made during those days would be considered reasonable. At the same time I cannot agree with Serjeant Dodd, that this increased expedition was evidence that the merchant was desirous to do all he could for the ship-owner. He might easily have done more, but he never abandoned his position that he was entitled to detain the vessel for

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eight days, and he was resolved to insist on what he believed to be his right, not for the purpose of annoyance, but because of the arrangements which he had made with his customers. The controversy, however, had then begun. He was threatened with litigation; and although he was not going to concede anything on that account, he was determined that he would not leave himself open to an action by a chance detention of the ship beyond the customary time. I have now come to Saturday evening on the assumption that theretofore there was no default on the part of the merchant. On that evening there were still 183 tons of the cargo on board, and it is said that the merchant was under the impression from the bill of lading that there were about 70 tons more. Whether we take the customary rate of despatch relied on by the merchant, or the actual rate of despatch during the four previous days, there seems to have been ample time to discharge on the Monday even more than what the merchant supposed remained of the cargo after making ample allowance for some delay in separating the good from the damaged grain as the holds became empty. But suppose this was a matter of doubt, what justification was there for discharging on the second Monday from only two holds when the log shows that there was grain in three and probably in four? There has been no explanation of this suggested, nor can it be explained except by the manifest fact that it was a foregone conclusion by the merchant that the ship would not be cleared until the following day. As a matter of fact it turned out that even with the small amount of expedition used, only 27 tons remained in the ship at the dinner hour on Monday, when for some reason which, to my judgment, is wholly unaccounted for except by the foregone conclusion already referred to, the men stopped work. There is, I think, no evidence that, if the discharge had gone on, these 27 tons, with the sweepings of the holds, could not have been delivered before 6 o'clock. But even if there were such evidence, there would still remain the default in the morning when, if proper expedition had been used, the vessel would, at 11 o'clock, have been in the position at which it was at 2 o'clock. The result is that the plaintiffs are entitled to one day's demurrage.

Serjeant Dodd thinks it an unfortunate result that his client

should be visited with the costs of the litigation for such a small default. It seems to me that his client is peculiarly fortunate. The position taken up by him was wrong all through; and the effect of his erroneous contention has been to detain the plaintiffs' vessel beyond the period in which she could have been discharged by reasonable diligence. It would be indeed unfortunate if a ship-owner who has been entirely in the right in the important matter in controversy, should be defeated by what I may call a series of accidental circumstances unconnected with the main issue.

Solicitors for the plaintiffs: *Milward Jones & Cameron.*
Solicitors for the defendant: *Hamilton & Craig.*

G. Y. D.

REG. (WARDEN) *v.* INSPECTORS OF IRISH FISHERIES (1).

Q. B. Div.
1898.
April 20.

Salmon Fisheries (Ireland) Acts—Fixed nets—Inquiry as to title—Mandamus —26 & 27 Vict. c. 114, s. 40.

The Inspectors of Irish Fisheries granted a certificate in 1880, to F. C. B. of his right to use a fixed bag net in the river Sneem. In 1883 a lease of the fisheries in the river Sneem was made to "The Sneem (Co. Kerry, Ireland) Oyster and Salmon Fisheries Company, Limited," for twenty-one years from November 1st, 1882. A transfer of the certificate to J. F. B., then the manager of the Company, was signed by the Inspectors in 1889. The lands in connexion with which the fishery was enjoyed were purchased in the Landed Estates Court in 1891 by the prosecutors. Shortly afterwards the Company went into liquidation, and was dissolved on the 17th June, 1893; and thereupon the lease granted in 1883, was struck out of the Landed Estates Court rental, and was not referred to in the conveyance to the prosecutors. The liquidator of the Company declined to execute a surrender of the lease after the dissolution of the Company. The original owners, by deed dated the 14th July, 1893, granted to the prosecutors the above-mentioned fisheries and the right to use the fixed net. In April, 1897, an application was made to the Inspectors for a transfer of the certificate to the prosecutors, but the Inspectors refused to comply with

(1) Before PALLES, C.B., and O'BRIEN and ANDREWS, JJ.

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this request until they should be satisfied that the lessee's interest in the lease of 1883 had determined.

On an application to make absolute a conditional order directing the Inspectors to execute the required transfer to the prosecutors :—

Held, that inasmuch as section 16 of 32 & 33 Vict. c. 33, imposing a penalty, necessitates the obtaining of a certificate, mandamus will lie, notwithstanding the provisions of section 40 of 26 & 27 Vict. c. 114 (1), to compel the Inspectors of Irish Fisheries to hold an inquiry into an applicant's claim for such certificate.

MANDAMUS.

Motion to make absolute a conditional order for a writ of mandamus directed to the Inspectors of Irish Fisheries commanding the Inspectors to issue a transfer of a certificate under the Fisheries (Ireland) Act, 1869, authorising the use of a fixed net in Kenmare Bay, then held by Francis Christopher Bland, to Agnes Warden, William Warden, and Charles Wallace Warden, or for the issue to the last-named persons of a new certificate authorising the use by them of such fixed net. The Inspectors of Irish Fisheries showed cause.

It appeared from the affidavits that an inquiry was held under the provisions of the Fisheries (Ireland) Act, 1863, by the Inspectors of Irish Fisheries; that they were then satisfied that Mr. Francis Christopher Bland was the person entitled to the right of salmon-fishing in the river Sneem, and that a fixed bag net then in use in said river had been erected by him, in pursuance of the provisions of 5 & 6 Vict. c. 106, and that they accordingly granted a certificate dated the 10th January, 1880, certifying that Mr. F. C. Bland had the right to erect and use such fixed net. Mr. F. C. Bland and Mr. James Franklin Bland, at the time this certificate was issued, were owners of a large property in the county Kerry comprising the said river Sneem.

A Company entitled "The Sneem (Kenmare, county Kerry, Ireland) Oyster and Salmon Fisheries Company, Limited, was incorporated in June, 1883, and on the 1st October, 1883, Mr. F. C. Bland executed a lease to the Company demising an oyster-bed

(1) The 40th section enacts "that the Commissioners shall not be required by writ of mandaums, or any writ of a like nature, to do any act or take any proceeding under this Act."

known as "The Bland Oystery Fishery," and the salmon-fishing in the river Sneem and its tributaries, for the term of twenty-one years from the 1st November, 1882. No transfer of the certificate of the 10th January, 1880, was made until the year 1889, when, in accordance with the requirements of the Inspectors, Mr. James F. Bland was nominated by the Company as the person to receive such transfer on their behalf, and thereupon the Inspectors signed a transfer of the said certificate to Mr. J. F. Bland, who was at that time official manager of the Company. In this transfer the lease of the 1st October, 1883, was erroneously recited as being dated the 1st October, 1880.

In the year 1891 proceedings were instituted in the Land Judge's Court for the sale of the Messrs. Bland's estate. In the printed conditions of sale settled in these proceedings, it was set out that the owners of the estate had from time immemorial worked a fixed net and exercised the exclusive right of fishing in the river Sneem; that these fisheries were then let to the Company under the above-mentioned lease, and that the owner's right to use the fixed net and the said fishing would not be conveyed by the Court, but were intended to pass to the purchaser, without further consideration, along with certain lands comprised in Lot 1, and that the owners were prepared to execute a conveyance of such rights to the purchaser.

On the 12th June, 1891, the whole estate was put up for sale, and in the same year Agnes Warden, Charles Wallace Warden, and William Warden were declared the purchasers of the larger portion, which comprised Lot 1.

On the 18th December, 1891, the Company went into voluntary liquidation, and Mr. J. F. Bland was appointed the liquidator. The Company was dissolved as from the 17th June, 1893, under 25 & 26 Vict. c. 89, ss. 142 and 143.

The Company having been dissolved, the lease of 1st October, 1883, was struck out of the schedule of tenancies annexed to the Landed Estates Court rental, and the Landed Estates Court conveyance, executed to the purchasers on the 14th July, 1893, omitted all reference to said lease. On the same date the owners, Messrs. F. C. Bland and J. F. Bland, executed a deed of grant, conveying to the purchasers in fee-simple the above-mentioned fisheries and

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the right to use the fixed net. The solicitor for the Company subsequently declined to approve of a draft surrender by the liquidator of the lease of the 1st October, 1883, which was furnished by the purchasers' solicitor, on the ground that the Company had been wound up, and that the powers of the liquidator had determined.

On the 2nd April, 1897, an application was made to the Inspectors of Irish Fisheries on behalf of Agnes Warden, Charles W. Warden, and William Warden, the purchasers, for a transfer of the license to use the said bag net; and in reply to such application they were informed that the Inspectors could not see their way to grant the required transfer until they should be satisfied that the lessee's interest in a certain lease of 1st October, 1880, and the lease of 1st October, 1883, had been surrendered.

Further correspondence ensued, in which the purchaser's solicitor pointed out that the lease of 1st October, 1883, had been wrongly recited as of the 1st October, 1880, and that no lease of the last-mentioned date had ever been executed. The Inspectors, however, declined to grant the required transfer, and the purchasers obtained the conditional order on the 13th January, 1898.

Samuels, Q.C. (with him *Leech*), for the applicants :—

The Inspectors were mistaken in thinking there was any other lease than that of the 1st October, 1883. This lease was, at the time of the dissolution of the Company, vested in the Company and not in the liquidator. There is no section of the Companies Acts vesting property in the liquidator, but prior to the 17th June, 1893, the liquidator could have surrendered it (Companies Act, 1862, section 95). The provisions of sections 142 and 143 of the same Act have been fully complied with, and thereupon the Company ceased to have any legal existence. There was an escheat of the lessee's interest to the lessor, and thereby a surrender by operation of law of the lease of 1st October, 1883. The Inspectors should execute a transfer to the applicants, who have in them the interest of both lessor and lessee: Co. Litt., 13. B; Grant on Corporations, p. 303. The certificate given under 26 & 27 Vict. c. 114, s. 6, was merely a document of title, and was not required to enable a net to be used until the penalties were imposed by

32 & 33 Vict. c. 92, s. 16, for fishing without a certificate. Prior to 1869 there was no such penalty. The 40th section of 26 & 27 Vict. c. 114 is repugnant to the 16th section of the Act of 1869, and a mandamus can be granted now, if not for a certificate, at any rate, for an inquiry, where the Inspectors decline to hold an inquiry. [He referred to the judgment of Palles, C.B., in *The Queen* (*Coghlan*) v. *Inspectors of Irish Fisheries* (1); *Reg.* (*Reeves*) v. *Inspectors of Irish Fisheries* (2).]

Morphy, for the Inspectors, opposed the application :—

There is no jurisdiction to grant a mandamus for a certificate : sect. 40 of 26 & 27 Vict. c. 114. That section applies to certificates to use fixed nets, to which section 6 of that Act applies : judgment of Holmes, J., in *Coghlan's Case* (1). Even if there were any power to grant a mandamus to compel the Inspectors to hold an inquiry, such a course would be most unfair, as the applicants never asked for an inquiry but demanded the transfer, or a new certificate. This the Inspectors could not comply with, for though the lease of October 1, 1883, might have ceased to exist, if vested in the Company at the date of its dissolution, the Inspectors have not been shown that it was so vested, and had not been assigned elsewhere. What was applied for when the conditional order was obtained was not what is now sought, namely, a mandamus directing the Inspectors to hold an inquiry.

The judgment of the Court was delivered by—

PALLES, C.B. :—

It has been practically admitted during the argument, and is abundantly clear, that if the lease of the 1st October, 1883, was not assigned or dealt with by the Company prior to its statutable dissolution, it was determined by that event, and consequently that the prosecutors are now entitled in possession to the fishery. If, therefore, it be satisfactorily shown, by proper searches or otherwise, that the lease has not been so assigned or dealt with, the prosecutors are entitled to a certificate under 26 & 27 Vict. c. 114, s. 6, without which they cannot lawfully fish.

(1) [1896] 2 Ir. R. at p. 65. (2) 20 L. R. Ir. 155.

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Upon the other hand, I think it clear that, as the Inspectors are entitled to judicially consider such matters as may appear in the course of an inquiry as to the prosecutors' title, we have no power to grant a mandamus directing them to give a certificate.

Thus, the matter for decision is reduced to this: have we power to issue a mandamus to them to hold an inquiry as to the prosecutors' title; and if so, ought we, under the circumstances of the case, and the frame of the conditional order, to grant such a mandamus?

As to this, three matters have been relied upon by Mr. Morphy: one of the gravest importance; the other two of the merest form. First, he says that section 40 of 26 & 27 Vict. c. 114, precludes the Court from issuing such a mandamus. The words of that section, "The Commissioners shall not be required by writ of mandamus or any writ of a like nature to do any act or take any proceeding *under this Act*," apply, he argues, to the necessary inquiry in the present case. Secondly, he contends that, even if we have this jurisdiction, as the demand of the prosecutors was for a certificate, and not for an inquiry, there was no sufficient demand to entitle them to such a mandamus; and, thirdly, that the frame of the conditional order, which is for a mandamus to grant a certificate, precludes us from now granting an absolute order for a mandamus of a different description.

The origin of the jurisdiction to hold an inquiry is the 26 & 27 Vict. c. 114, s. 6. "Where any fixed net . . . is in use at the time of the passing of this Act, and any person claims to have erected the same in pursuance of the Act 5 & 6 Vict. c. 106, the Commissioners may, on proof being given to their satisfaction that such fixed net has been erected in pursuance of the said provisions, certify to that effect. A certificate given in pursuance of this notice shall be deemed to be an order of the Commissioners, and to be subject to appeal as such. If unappealed from, or as confirmed or amended on appeal, such certificate shall be conclusive evidence that the person therein named is the person specified in the said Act as entitled to exercise the right therein given."

This Act does not contain any provision that a person entitled to a legal fixed net may not lawfully use it without a certificate. A certificate, therefore, as the law stood immediately after this Act,

was not essential to the lawful use of a legal net. Its only effect was that it was conclusive evidence of title; and had there not been subsequent legislation I would have thought it clear, as I stated in *The Queen* v. *Fisheries Inspectors* (1), that there would not be jurisdiction to issue the writ to hold the inquiry. The legislation, however, does not stop there. The Act of 1869, 32 & 33 Vict. c. 92, by its 16th section, imposes a penalty upon any person who shall fish with, or make use of, any fixed engine for the capture of salmon without having obtained a certificate either from the Special Commissioners under the Act of 1863, or from the Inspectors acting in the execution of the Act of 1869, in whom the powers of the Special Commissioners had become vested. The effect of this section is that if the Inspectors, on the application of a person who, if he obtained a certificate, would be entitled to use a fixed net, refuse to inquire into his title, and if they were not by law compellable to inquire, such person would, by the mere omission of the tribunal, be unable to exercise his legal right. This conclusion is so contrary, not only to natural justice, but to the ordinary principles of legislation, that we must critically examine the statutes to determine whether such a result necessarily flows from them. In order that it should so result, it would be necessary to affirm two propositions of law:—1, that the inquiry in the present case was a proceeding under the Act of 1863, as distinguished from that of 1869; because it is clear that although section 20 of the Act of 1869 directs that it and the Act of 1863 shall be construed together as one Act, with the exception therein mentioned, the effect of such incorporation is not to apply to proceedings under the second Act the provisions of the first Act. This was decided by the Court of Appeal in *The Queen* v. *Wall* (2), and as the *necessity* for the inquiry arises under the Act of 1869, and not under that of 1863, I am not quite satisfied that the proceeding must not be deemed to be one under the Act which rendered it essential—that of 1869. But, be this as it may, the second proposition that should be affirmed, assuming that the proceeding is to be treated as one under the Act of 1863, is that section 40 of that Act is not repugnant to section 16 of the later

(1) [1896] 2 I. R. 40, 57. (2) [1898] 2 I. R. 762, 769.

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Act. I considered this question in *The Queen* v. *Fisheries Inspectors* (1); but, in result, it became unnecessary to determine it there. I there said, "Unless, therefore, section 16 of the Act of 1869 can be deemed to have altered section 40 of the earlier Act, or is repugnant to it, a mandamus cannot issue. Are these sections, or are they not, repugnant? This appears to me to be a question of some difficulty, and it is one upon which I have not formed a definite opinion. Having regard to the principle that we ought not to give to general words a construction which would injuriously affect private rights without compensation, I am not clear that they must not be regarded as repugnant. If they stand together, their joint effect would appear to be to allow the exercise of the rights of property of one person to depend upon the whim or caprice of another. There was nothing contrary to natural justice in the application of section 40 to every duty created by the earlier Act. An omission by the Special Commissioners to exercise their powers under that Act could not prejudicially affect any theretofore existing private right. A certificate under section 6 would be beneficial to a net owner, as it had a certain conclusive effect in evidence, but its absence could not prevent his exercise of any legal right of fishing he might have; and whilst the Legislature conferred upon the Special Commissioners the power of giving him a certificate, they might well provide that they should not be compellable to do so."

As I have stated, it was not, in that case, necessary to decide the point. In the present case it has become necessary; and I can only say that, for the reasons expressed by me in *The Queen* v. *Fisheries Inspectors* (1), I am of opinion that if the proceeding is to be deemed one under the Act of 1863, section 40 is repugnant to the 16th section of the Act of 1869, and does not apply to any proceeding rendered necessary for the first time by the latter Act.

As to the two other points, they are, as I have stated, of the merest form. Taking the correspondence as a whole, the Inspectors appear to me to have held that the effect of the dissolution of the Company was not to terminate the lease, and that therefore the prosecutors had no title in possession to the fishery. I think that

(1) [1896] 2 I. R. p. 66.

their refusal upon this ground to grant a certificate amounted to a refusal to institute an inquiry, or to do any act with the ultimate view of granting a certificate.

As to the remaining ground, the Court is at liberty, in its discretion, to grant an absolute order for a mandamus in the first instance, when all necessary parties are before it. *A fortiori*, upon cause being shown against a conditional order, we may mould our order to suit the exigencies of the case, and may grant it in terms different from those of the conditional order. This course was taken by the Court of Appeal in *Lord Rossmore's Case* (1).

In my opinion, the mandamus to hold an inquiry should go.

Solicitor for the applicants: *E. C. Jameson.*
Solicitor for the Inspectors: *Sir P. Coll.*

J. H. P.

IN THE MATTER OF AN ARBITRATION BETWEEN THE COMMERCIAL UNION ASSURANCE CO., LIMITED, THE NATIONAL ASSURANCE CO. OF IRELAND, THE GUARDIAN FIRE AND LIFE ASSURANCE CO., LIMITED, AND THE NORWICH UNION FIRE OFFICE AND THOMAS CORLESS (2).

Practice—Taxation of costs—Motion—Three counsel—Fee for settling affidavits—Consultation—Discretion of Taxing Master in reducing fees paid.

There is no rule preventing the allowance of three counsel as between party and party on a motion in this Division.

On an unsuccessful motion to set aside an award, disallowing a large portion of the claim which was the subject of arbitration, on the grounds of miscarriage in procedure and personal misconduct on the part of two out of three arbitrators, and the arguments on which occupied two days, the Court allowed, as between party and party, three counsel and the settlement of affidavits by senior counsel, but disallowed a consultation for that purpose, and refused, under the special circumstances of the case, to interfere with the discretion of the Taxing Master in reducing considerably the fees actually paid to counsel on their briefs.

(1) [1894] 2 I. R. 394. (2) Before JOHNSON, MURPHY, and KENNY, JJ.

Q. B. Div. 1898. *In re* Corless.

Motion on behalf of the above mentioned Companies to review taxation.

The above named Thomas Corless who is the owner of the Burlington Restaurant, Dublin, insured the said premises against fire with the said Companies. A fire having taken place and a considerable quantity of the stock being burnt and destroyed, he made a claim for the amount of the damage. After some negotiation an agreement to arbitrate was entered into, whereby the claim was left to the arbitration of three persons therein named. The arbitrators so appointed duly made and published their award, whereby they disallowed a large portion of the claim. The claimant then applied to the Divisional Court to set aside the said award on the grounds of miscarriage of the said arbitration, and also by reason of personal misconduct on the part of two of the three arbitrators. This application came on for hearing before the Divisional Court during the Easter Sittings, 1898, and was two days at hearing. At the conclusion of the arguments judgment was delivered refusing the application with costs. Previously to the hearing of the application two counsel, one a senior and the other a junior counsel, were instructed on behalf of the said Companies; and the said counsel held a consultation, and settled the affidavits in reply to the affidavit upon which the application was grounded. Three counsel were briefed on the hearing of the motion. The solicitor for the said Companies furnished his bill of costs, which duly came before Master Coffey for taxation. Amongst other items charged were the following:—

11. Two copies of draft joint affidavit of Messrs. Fry and Hume, for use of counsel in consultation, 108 folios,	£1	16	0
12. Like, Mr. Anderson, 30 folios,	0	10	0
13. Docket of consultation,	0	3	4
14. Attending Mr. O'Shaughnessy, Q.C.,	0	6	8
15. Paid him fee,	2	2	0
16. Docket for Mr. Littledale,	0	1	0
17. Attending counsel,	0	6	8
18. Paid him fee,	2	2	0
19. Attending consultation when affidavits settled,	0	13	4

The Taxing Master disallowed these items on the ground that a consultation to settle affidavits was not allowable on a taxation of costs as between party and party.

Also the following items :—

58. Brief for counsel, 69 sheets,	£6	18	0
59. Facsimile brief, 12 folios at 6*d.*,	0	6	0
60. Copy notice to annex, 6 folios,	0	2	0
70. Attending the Right Hon. The Mac Dermot, Q.C.,	0	13	4
71. Paid him fee,	21	0	0
81. Attending the Right Hon. The Mac Dermot, Q.C.,	0	6	8
82. Paid him fee,	2	2	0
83. Docket,	0	1	0
91. Attending the Right Hon. The Mac Dermot, Q.C.,	0	3	4
92. Paid him fee,	5	5	0
93. Docket,	0	1	0

As to these items the Taxing Master reported as follows : "It was contended by Mr. Corless's solicitor that the motion was not of sufficient importance to justify the allowance of a second senior counsel, and further that unless the Court directed three counsel to be allowed, I should disallow the second senior counsel, and acting on this view, I considered two counsel quite sufficient on a motion to set aside an arbitration."

Also the following items :—

75. Paid counsel fee,	£21	0	0
79. Paid counsel fee,	15	15	0

The Taxing Master considered that these fees were excessive as party and party fees ; and accordingly allowed only £10 10*s.* in No. 75, and £8 8*s.* in No. 79.

Littledale (with him *O'Shaughnessy, Q.C.*), in support of the motion :—

The Taxing Master in taxing the costs seems to have treated the case as if it were an ordinary motion ; whereas the case should be treated as a final hearing, involving serious questions of law and fact. Besides the case lasted two days ; and it was eminently deserving great care and attention. As to the items 11 to 19,

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which were disallowed, it was very important that these affidavits should be settled by counsel in consultation; and there is no rule against it. As to the second set of items, they may have been to some extent discretionary with the Taxing Master: Order LXV., Rule 64 (37); but having regard to the importance of the case, he should have allowed the third senior counsel. The last set of items were not excessive.

[Counsel cited *In re the South Meath Election Petition* (1); *Robb* v. *Connor* (2); *Jessop* v. *Cusack* (3).]

Rosenthal (with him *Serjeant Dodd*), *contra*:—

As to the consultation fees, they were clearly not allowable for such a purpose as settling affidavits. If it had been a proper case in which to allow fees for settling affidavits, the bill of costs cannot now be amended so as to allow the fees in that way. It is entirely unusual to allow a third senior counsel on a mere motion; and the large fees were clearly excessive in party and party costs, though no doubt allowable in solicitor and client costs.

[Counsel cited *Grady, a lunatic* (4).]

JOHNSON, J.:—

I am of opinion that the Taxing Master was right in disallowing consultation fees to settle affidavits, and also in the fees which in the exercise of his discretion he has certified for counsel on the hearing of the motion to set aside the award. The Court is in general slow to interfere with the discretion of the Taxing Master in fixing counsel's fees when he has taken into consideration all the matters to which he is to have regard under Ord. LXV., R. 64 (37), and I observe that he has liberally allowed refreshers to counsel. But I am of opinion that the Taxing Master has not proceeded on a right principle in disallowing a third counsel to the Assurance Companies on the hearing of the motion to set aside the award. From his report he would seem to have considered that no more than two counsel should be allowed on a motion; but it is settled that there is no fixed rule absolutely limiting the number of

(1) 32 L. R. Ir. 407.
(2) Ir. R. 9 Eq. 373.
(3) 25 L. R. Ir. 244.
(4) 10 Ir. Jur. (N. S.) 49.

counsel to two on a motion in the Common Law Division; and the motion in which the costs now under consideration were awarded against Corless was, in my opinion, an exceptional and important one. It was a motion to set aside an award by two of three arbitrators reducing nearly by one-half an exaggerated claim under a fire policy for loss to a large amount; not only was the award impeached by Corless on the grounds of miscarriage in law, but charges of grave and serious personal misconduct were made and pressed by him against the two arbitrators. The Court after investigating these charges decided that they were unfounded, and confirmed the award. On these special grounds I am of opinion that a fee ought to be allowed to senior counsel for settling the affidavits, and that a third counsel ought to be allowed to the Assurance Company on the motion to set aside the award. In the present application each party has partly succeeded and partly failed, and therefore there will be no costs to either side.

With this intimation of our opinion the Taxing Master's certificate will be referred back to him to review his taxation and allow a fee to senior counsel for settling the affidavits, and a third counsel to the Assurance Company on the hearing of the motion to set aside the award.

MURPHY and KENNY, JJ., concurred.

Solicitor for the Assurance Companies: *J. Walker.*
Solicitor for T. Corless: *J. D. Rosenthal.*

J. P. B.

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SCOTT'S STANDARD PNEUMATIC TYRE CO., Limited, *v.* THE NORTHERN WHEELERIES CYCLE MANUFACTURING CO., Limited (1).

(1898. No. 2960.)

Tender—Payment into Court of the amount tendered with further sum—Severable items—Costs—R. S. C. Ir., Ord. XXII., R. 8.

Where the defendant pleads tender before action brought, and lodges the amount tendered in Court, and also pleads payment into Court of a further sum, in addition to the amount lodged under the plea of tender, in full discharge of the plaintiff's claim, the plaintiff, on drawing the two sums out of Court in satisfaction of his claim, has "recovered in the action" only the excess above the tender, where the defendant's tender was made in respect of specific items in the claim, severable in themselves; and is only entitled to costs accordingly.

James v. *Vane* (2 E. & E. 883) followed.

Motion on behalf of the defendants to review the taxation of costs.

The action was brought to recover the sum of £59 9*s.* 6*d.* for goods sold and delivered. The claim was on a specially indorsed writ, and consisted of seven items, which were admittedly severable into distinct causes of action. The plaintiffs moved for judgment on an affidavit that the full amount was due.

The defendants, for the purpose of resisting the motion, filed an affidavit, in which they admitted that a sum of £37 9*s.* 6*d.* was due by them; but they stated that they had tendered that sum to the plaintiffs before action brought, in respect of certain specific items of the claim, which items they specified in their affidavit. The defendants denied that any further sum was due by them than the amount tendered. The Court gave the defendants leave to defend on lodging the sum of £39 in Court. The defendants lodged £39 in Court. The defendants, by their defence, save as

(1) Before Boyd and Kenny, JJ.

to £37 9*s.* 6*d.*, portion of the amount claimed, traversed the sale and delivery of the goods. They then pleaded tender, before action brought, of £37 9*s.* 6*d.*, and that they had paid that sum into Court. They also pleaded payment into Court of a further sum of £1 10*s.* 6*d.*, and said that this sum, together with the £37 9*s.* 6*d.*, was sufficient to satisfy the plaintiffs' claim in the action. The plaintiffs drew out the £39, and proceeded to tax their costs under Order XXII., Rule 8. The parties resided in different civil bill jurisdictions. The Taxing Master gave the plaintiffs full costs, holding that they had recovered £39 in the action. The tender was not denied.

Bates, for the defendants:—

The Taxing Master is wrong. The plaintiffs have only recovered £1 10*s.* 6*d.* in the action. The items in respect of which the tender was made are severable and the tender was specifically appropriated to them. *O'Rorke* v. *M'Donnell* (1) is distinguishable: there the items were not divisible and severable. [He cited *James* v. *Vane* (2); *Hesketh* v. *Fawcett* (3); *Dixon* v. *Walker* (4); *Myers* v. *Phelan* (5); *Dixon* v. *Clarke* (6); *Griffiths* v. *Ystradyfodwg School Board* (7).] The plea of payment into Court, relying on the sum already appropriated under the plea of tender, might possibly have been objected to by the plaintiffs as embarrassing; but this cannot affect the plea of tender. Under that plea £37 9*s.* 6*d.* was appropriated to the plaintiffs' claim, which thereby belongs absolutely to the plaintiffs, and can be drawn out at any time, and when drawn out is drawn out under the plea of tender. If the action had proceeded to trial on the issue of tender, and the jury had found that there was a tender, but that the plaintiffs were entitled to the further sum of £1 10*s.* 6*d.*, the case would have been identical with *James* v. *Vane* (2), which is an absolute authority that only £1 10*s.* 6*d.* was recovered. How can the fact of the plaintiffs drawing out the money at an earlier stage alter the amount recovered?

(1) 13 Ir. C. L. R. App. viii.
(2) 2 E. & E. 883.
(3) 11 M. & W. 356.
(4) 7 M. & W. 214.
(5) 26 L. R. Ir. 218, at p. 252.
(6) 5 C. B. 365.
(7) 24 Q. B. D. 307.

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SCOTT'S PNEUMATIC TYRE CO. v. NORTHERN WHEELERIES CYCLE CO.

Traill, for the plaintiffs:—

We admit that the items are severable. But this is a question on the pleadings, and as they stand we are entitled to full costs. [He referred to *O'Rorke* v. *M'Donnell* (1), and Gen. Ord. XXII., R. 8.]

BOYD, J.:—

We are of opinion that *James* v. *Vane* (2) applies to this case. On the authority of that case, which has never been questioned, we think that the plea of tender is an answer to that part of the plaintiffs' claim to which it is pleaded, and that the plaintiffs are not entitled to the costs of the action, unless the amount further recovered so entitles them. *James* v. *Vane* (2) has never been trenched upon, and it was not questioned by the Court of Appeal in *Myers* v. *Phelan* (3).

KENNY, J.:—

The claim in this action is for the recovery of the sum of £59 9*s.* 6*d.* for goods sold and delivered. The claim was made up of seven distinct items—the two main items being sums of £28 10*s.* 0*d.* each. The writ being specially endorsed, the plaintiffs instituted a motion for final judgment, and in their affidavits used on the hearing of that motion, the defendants alleged that they had made a tender before action of the sum of £37 9*s.* 6*d.*, represented by specific items in the claim, and that they were ready to bring that amount into Court. The Court on the hearing of the motion gave the defendants leave to defend on the terms of lodging the sum of £39 in Court. We have no means of ascertaining how this sum of £39 was arrived at. The defendants lodged that sum in Court, and by their defences, save as to £37 9*s.* 6*d.*, parcel of the price of the goods sued for, traversed the cause of action. As to £37 9*s.* 6*d.*, they pleaded tender before action brought and payment of that amount into Court. In a subsequent paragraph they said that, as to the whole cause of action they had paid into Court a further sum of £1 10*s.* 6*d.*, making with the said sum of £37 9*s.* 6*d.* the sum

(1) 13 Ir. C. L. R. App. viii. (2) 2 E. & E. 883. (3) 26 L. R. Ir. 218.

of £39, and that that sum was sufficient to satisfy the plaintiffs' claim. The defendants have thus segregated the several items on the writ in respect of which they have paid the £37 9*s.* 6*d.* into Court under the plea of tender. After the lodgment of the money the plaintiffs accepted the £39, and they now come to ask for the entire costs of the action, on the ground that they must be taken as having recovered therein the sum of £39. On this point two cases have been cited to us, namely, *James* v. *Vane* (1); and *O'Rorke* v. *M'Donnell* (2). *James* v. *Vane* (1) is prior in point of date, and is referred to in *O'Rorke* v. *M'Donnell* (2). In the latter case it was admitted by all the Judges, that *James* v. *Vane* (1) was rightly decided. That case went to this, that where the demands are divisible and consist of severable items, it is open to the defendant to segregate the items he admits, and pay into Court, with a plea of tender, a sum in satisfaction of the items so segregated, and that no sum can be regarded as recovered in the action except what is recovered over and above the amount lodged on the plea of tender. In *O'Rorke* v. *M'Donnell* (2) the facts were different. The claim there was for salary. It was an unseverable and indivisible claim, and the defendant having paid into Court, under a plea of tender, a sum which was insufficient, had to bear the costs. The principle of *O'Rorke* v. *M'Donnell* (2) was recognised in the judgment of Lord Justice FitzGibbon, in *Myers* v. *Phelan* (3). I am, therefore, of opinion that here the £37 9*s.* 6*d.* was paid into Court in respect of items in a severable and divisible demand, and that having been lodged on a plea of tender, and drawn out by plaintiffs without having the issue as to the tender brought to trial, it cannot be regarded as portion of the amount "recovered" in the action within the meaning of Order LXV., Rule 3. That being so, the only amount "recovered" was the £1 10*s.* 6*d.* which was not covered by the plea of tender, and consequently the plaintiff is entitled only to half costs of the action.

Solicitors for the plaintiffs: *L'Estrange & Brett.*
Solicitor for the defendants: *P. J. Magee.* J. M'G.

(1) 2 E. & E. 883. (2) 13 Ir. C. L. R. App. viii. (3) 26 L. R. Ir. 218.

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PORTER *v.* THOMPSON (1).

(1898. No. 7550.)

Action of contract—Verdict for less than £20—Parties residing in same civil-bill jurisdiction—Proceedings after judgment—Costs—R. S. C., Ir., Ord. LXV., R. 4.

Where the parties in an action of contract reside in the same civil-bill jurisdiction, and the plaintiff recovers less than £20, he is not entitled to the costs of and incident to an order attaching a fund in Court to which the defendant is entitled, or of a motion to make that order fruitful.

MOTION on behalf of the plaintiff that out of the sum of £33 19*s.*, standing to the credit of the action of *Thompson* v. *Alexander Brown and Others*, Record Number, 1898, No. 1226, attached by order in this action, dated the 28th day of June, 1898, such sum should be paid to the sheriff of the city of Dublin by the Accountant-General as should satisfy the plaintiff's claim and costs of these proceedings, and for the costs of this motion, and proceedings thereunder.

The plaintiff obtained judgment against the defendant on the 21st of June, 1898, for the sum of £7 12*s.* On the 28th day of June, 1898, the plaintiff obtained an order attaching to the extent of, and to answer the plaintiff's said judgment, a sum of money lodged to the credit of an action, in which the defendant was plaintiff, and to a portion of which, exceeding the sum of £7 12*s.*, he was, in the result, entitled. The defendant admitted the plaintiff's right to the sum of £7 12*s.*, and undertook to pay him that sum, on getting the amount lodged to the credit of the action in which he was plaintiff, paid out to him; but he resisted the plaintiff's claim to the costs asked for in the notice of motion.

(1) Before ANDREWS and MURPHY, JJ.

A. F. R. Stritch, for the plaintiff :—

Though the plaintiff is not entitled to the costs of the action, he is entitled to the costs of the charging order and of this motion. The latter are costs of proceedings subsequent to judgment, and are not costs in the action within the meaning of Ord. LXV., Rr. 3 and 4; see *Spencer* v. *Hayes & Co.* (1). The costs of a charging order are never dealt with when the order is made, but are within the discretion of the Judge who hears the motion to make the order fruitful: *Massereene* v. *Brannigan* (2); *Casey & Clay* v. *Cotton* (3); the notice of motion is in the same form as in these cases. [He referred to the 133rd section of the Common Law Procedure Act of 1853.] The policy of Order LXV., Rule 4, is to prevent actions for small amounts being commenced in the superior Courts, but that does not apply to the costs of proceedings to realise the judgment when obtained.

D. Kehoe, for the defendant :—

The costs of and incident to the charging order, and the costs of this motion are costs in the action, and cannot be allowed: Ord. LXV., R. 4. In *Massereene* v. *Brannigan* (2) and *Casey & Clay* v. *Cotton* (3), the judgments were for sums over £20. Those cases do not apply to the present action, In *Spencer* v. *Hayes & Co.* (1) the costs allowed were in respect of an application by the defendant which failed.

ANDREWS, J. :—

No reported authority has been cited upon this application, the notice of motion for which is as follows—[his Lordship read the notice of motion as above set out and continued]. Mr. Kehoe's client was entitled to come here and resist the application, as it asked for more than in any view the plaintiff was entitled to in applying for the whole costs of the action, which I take to be included in the words "costs of these proceedings." It is now admitted that the costs of the action cannot be given. But, it is contended that the costs of obtaining the order of the 28th of

(1) [1894] 2 I. R. 14. (2) 22 L. R. Ir. 65. (3) *Ibid.* 555.

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PORTER v. THOMPSON.

Andrews, J.

June last, and of the motion to make it fruitful should be given. The rule dealing with the question is Ord. LXV., R. 4, which is in substance a repetition of sect. 97 of the Common Law Procedure Act, 1856—[his Lordship read the rule and continued]. In this case a certificate has not been given, and would not be given. The entire of the costs asked for if given would be given to the plaintiff in this action, and, on the construction of the rule we think they would be "costs in the action." But the rule says that the plaintiff in the action shall not, in a case like the present, be entitled to any costs. In the absence of authority we decline to make so far reaching a precedent as we would do if we construed the rule otherwise, and my recollection is that the construction we put upon the rule has on previous occasions been given to it judicially, though it appears that there is no reported decision on the point. We also desire to express our disapproval of litigation for these small amounts in the superior Courts, which often becomes oppressive. As after our decision the parties are satisfied with the defendant's undertaking that out of the sum of £33 lodged in the action of *Thompson* v. *Brown and Others*, the sum of £7 12*s*. shall be paid over to the plaintiff, less the costs of this motion, we make no rule on the motion, and give the defendant £3 3*s*. for his costs thereof, to be deducted from the £7 12*s*.

MURPHY, J., concurred.

Solicitor for the plaintiff: *Plaintiff in person.*
Solicitor for the defendant: *Defendant in person.*

J. M^cG.

TRENCH, MIDDLEMAN; DALY, LANDLORD (1).

Land Com. 1898. May 18.

Landlord—Middleman—Condition in lease attached to power of surrender—Non-fulfilment of such condition—Right of surrender under Land Law (Ireland) Act, 1887, sect. 8.

A condition attached to a power of surrender in a lease, under which a middleman holds, does not necessarily control or govern a surrender proposed to be made by him under the Land Law (Ireland) Act, 1887, sect. 8; that being a new right of surrender in addition to any other right he may otherwise have possessed under any instrument.

By lease dated the 22nd October, 1860, Lord Dunsandle, the predecessor in title of the present landlord, demised the lands of Cromagh, containing 50A. 0R. 16P. at the yearly rent of £50 2*s.*; and by a further lease of equal date the lands of Monanbragher, containing 55A. 2R. 20P. at a rent of £51 14*s.* 4*d.*, both of them situated in the county of Galway: to the Rev. Frederick Fitzwilliam Trench for the term of three lives respectively. Each lease contained a covenant that if the tenant should surrender the lands in pursuance of the clause of surrender therein contained, then and in that case he should sink or cause to be sunk a certain watercourse which was described as "leading to Ellagh" to a depth of four feet at the least. The Rev. F. F. Trench sublet the lands thus demised to him to a sub-tenant named Hugh Blehene, who in the year 1882 had a fair rent of £52 fixed upon the lands of Cromagh, and of £53 upon the lands of Monanbragher. Subsequently, on the 21st January, 1898, these rents were fixed for a second judicial term at £44 and £46 5*s.* respectively. About the year 1884, Hugh Blehene deepened the drain to Ellagh, but not nearly to the extent of four feet. On the 17th March, 1898, the Rev. F. F. Trench served notice on the landlord of his intention to surrender to him his interest in the above-mentioned lands pursuant to the provisions of the Land Law (Ireland) Act, 1887, section 8.

(1) Before MEREDITH, J., and the Hon. GERALD FITZGERALD, Q.C., Commr.

Land Com. 1898.

TRENCH, *Middleman*; DALY, *Landlord.*

The landlord now applied to the Court that the notice of surrender on the part of the middleman should be set aside, on the ground that such surrender, free from the condition attached to a surrender under the provisions of the leases, was invalid and inequitable.

The Right Hon. The MacDermot, Q.C. (with him *W. F. Kenny*), for the landlord :—

A surrender under a clause in a lease must comply with all the conditions precedent to such surrender: *Grey* v. *Friar* (1).. A surrender under the Act, 1887, is a legal surrender, and, therefore, before the middleman can surrender under that statute he must comply with the condition precedent to a surrender, *i.e.* the deepening and widening of the drain.

Cherry, Q.C. (with him *Meredith*), for the middleman :—

The right of surrender under the Act of 1887 is a new right quite independent of any right of surrender contained in a lease. It has nothing whatever to do with the particular contract of letting between the parties, but is merely based on a reduction of rent.

W. F. Kenny, in reply :—

The power of surrender conferred by section 8 of the Act of 1887 should be exercised, having regard to the conditions attached to the power of surrender under a lease; otherwise the surrender would be inequitable within the meaning of sub-section 8, sect. 8, of the Act of 1887.

MEREDITH, J. :—

We have had the advantage of considering the question involved in this case during the adjournment of the Court, and we do not think that any advantage would be gained by our reserving our decision.

The argument pressed on us by the learned counsel for the head landlord amounts to this, that if the middleman attempted to effect a surrender under the clause of surrender contained in the

(1) 4 H. L. Cas. 565.

lease, he would be met with and defeated by the objection that he was not in a position to comply with the covenant binding him (in the event of his taking advantage of the clause of surrender) to widen and deepen a drain. Now, the view we take of the case is this, that the covenant, condition, or fetter upon surrender contained in the lease has reference only to a voluntary surrender under the clause in the lease, and does not control or govern a surrender proposed to be made under section 8 of the Land Act of 1887. The distinction seems obvious enough; in the one case the lessee voluntarily relinquishes his interest in pursuance of and necessarily in compliance with the terms of his lease, and in the other case a surrender is more or less forced upon him by legislation and the results of legislation. Mr. Cherry argues with force that the Land Acts have entirely altered the position of the contracting parties and have made it impossible for the middleman to take advantage of the clause in his lease by reason of his having parted with possession to a sub-tenant who has had a fair rent fixed. Having been deprived of the benefit, he cannot (Mr. Cherry says) be still liable to the burden. In this connexion I do not think it unimportant to observe that the covenant as to the drain has reference only to a surrender, and that there is no such covenant or condition imposed in case the lease comes to an end in the ordinary course of events by the fall of the lives. In such case the head landlord would get back the holding without the benefit of having the drain sunk. It is also important to observe that no arrangement of the middleman with the sub-tenant has reduced the rent below what would otherwise have been the fair rent. It is not suggested that by fraud or collusion between the middleman and the sub-tenant the rent has been reduced, or that any improper act of theirs has led to its reduction. The position resolves itself into this:—The middleman cannot surrender under the lease, and his rent has been reduced "to a sum less than the rent which he pays" within the meaning of the Act. Accordingly he serves notice of his intention to take advantage of section 8 of the Land Act of 1887, and we are now asked to restrain him and to declare the contemplated surrender under the Act inequitable because a condition incidental merely to a surrender under the terms of the lease cannot be complied with. I fail to see why it should be

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TRENCH, *Middleman*; DALY, *Landlord.*

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inequitable under these circumstances for the middleman to take advantage of the section which exactly applies to his case. With regard to one of the arguments advanced by Mr. Cherry, viz. that the application of the head landlord was not *bona fide*, and should therefore be dismissed, we cannot agree with the learned counsel. This application had its origin in the fact that the middleman at one time contemplated surrendering under the clause in the lease. The head landlord pointed out that if the middleman desired to avail himself of the power of surrender in the lease, he must comply with the terms of the lease. Thus far the head landlord acted strictly within his rights. The middleman, however, reconsidered his position, and seeing that a surrender under the lease was impossible abandoned the position he had taken up and fell back upon the position created for him by the 8th section. In our judgment he was entitled to take this course; we fail to see why it should be deemed inequitable on his part to take advantage of a power of surrender which is conferred upon him by the Legislature apart from and independent of the provisions of the lease. But the question is a novel one, and the head landlord was fully entitled to seek for and obtain a decision of the Court.

We wish expressly to guard ourselves against the conclusion that we are deciding that we would not restrain a surrender, unless we were satisfied that there had been a course of conduct on the part of the middleman expressly diminishing or tending to diminish the fair rent. We decide that a covenant, condition, or fetter, call it what you please, having reference only to a voluntary surrender under a lease, has not necessarily any reference to a surrender under the Act of 1887. Section 8 of that Act gives the middleman a new right of surrender in addition to any other right he may otherwise have possessed under any instrument, and under the circumstances of the present case we decide that the proposed surrender is not inequitable.

We therefore refuse the application with costs.

Solicitors for the middleman: *Colles & Ward.*
Solicitor for the landlord: *Kenny.*

J. MAC M.

G. A. BOYD ROCHFORT, A MINOR, BY FLORENCE LOUISA BOYD, HIS GUARDIAN AND NEXT FRIEND *v.* SAMUEL HANDY SOMERS (1).

Q. B. Div. 1898. Nov. 22.

(1898. No. 14,048.)

Action for recovery of lands for non-payment of rent—Specially indorsed writ—Devolution of title—R. S. C. I., Orders II., R. 8, *and III., Rules* 6 *and* 6 (A).

In an action for the recovery of lands for non-payment of rent, where there is an existing lease, but neither the plaintiff nor the defendant is an original party to it, it is not necessary in a special indorsement of the writ of summons under Ord. III. R. 6 (A) of the Rules of the Supreme Court (Ireland), March, 1897, to set out the devolution of the title of the plaintiff or defendant from the original parties to the lease.

Burgess & Others v. *M'Craith* (1894 No. 53, unreported) followed.

MOTION on behalf of the plaintiff for judgment for possession of the lands claimed.

The claim on the writ of summons purported to be specially indorsed and set out that "all that and those the townlands of Kilbrenan and Midan, containing 1079A. 1R. 9P. statute measure, more or less, situate in the barony of Fartullagh and county of Westmeath, are held from the plaintiff by the defendant under an indenture of lease dated the 21st day of February, 1849, and made between George Augustus Boyd of the one part and John Richard Somers of the other part, at the yearly rent of £467 10*s.* 9¼*d.*, and the sum of £1048 11*s.* 4½*d.*, being one year and upwards of such rent due and ending the 1st day of May, 1898, is due to the plaintiff"; and claimed possession of the said lands. The writ also contained the averments necessary under Order III. Rule 6 (A.) of the rules made pursuant to the Land Law (Ireland) Act of 1896.

Herbert Wilson, for the plaintiff.

Law Smith, for the defendant:—

The writ is not specially indorsed. It does not show the devolution of the title of the plaintiff and defendant from the original parties to the lease: *Casey* v. *Hellyer* (2).

(1) Before KENNY J. (2) 17 Q. B. D. 97.

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Herbert Wilson, for the plaintiff:—

It is not necessary to show the devolution of the title of the parties. It was so decided in an unreported case in the Court of Appeal in this country of *Burgess & Others* v. *M'Craith* (1), the Court refusing to follow the English case of *Casey* v. *Hellyer* (2).

He also referred to *Kane* v. *Brownrigg* (3); *Keenan* v. *Carson* (4); *Bradley* v. *Chamberlyn* (5).

[KENNY, J., referred to *Barnes* v. *Barnes* (6)].

KENNY, J.:—

This is an application on behalf of the plaintiff for judgment on a writ alleged to be specially indorsed in an action for recovery of land for non-payment of rent. The special indorsement is as follows:—[His Lordship read the indorsement as above and continued]. The defendant says that this is not a specially endorsed writ, because, although it alleges that the lands are held by the defendant from the plaintiff under an indenture of lease, that lease is one made, not between the plaintiff and defendant, but between other and different parties, namely, George Augustus Boyd of the one part, and John Richard Somers of the other part, and the devolution of the title is not shown.

The procedure with regard to special indorsements in actions for recovery of land before the passing of the Land Law (Ireland) Act of 1896, is governed by Ord. II., Rule 8, and Ord. III., Rule 6. Ord. II. deals with writs of summons and procedure, and Rule 8 provides, [His Lordship read Rule 8, and continued:—] It is not necessary for the plaintiff to name as defendant in such a writ the actual tenant or undertenant. He may name as defendant and address his writ to anyone in actual possession of the lands, or any part of them, "and all other persons concerned." Ord. III., Rule 6, provides, *inter alia*, for special indorsements in actions for recovery of land, and a form of such special indorsement is given in Appendix C, sect. 7, Form 2, where the claim is one by a landlord against a tenant for recovery of land for non-payment of rent. [His Lordship read the form, and continued:—] The allegation contained in the form is that the defendant "holds"

(1) Unreported.
(2) 17 Q. B. D. 97.
(3) [1897] 2 Ir. R. 55.
(4) [1897] 2 Ir. R. 234.
(5) [1893] 1 Q. B. 439.
(6) 8 L. R. Ir. 165.

the lands claimed "as tenant to the plaintiff." The rules under the Land Law (Ireland) Act of 1896 provide, by Ord. III., Rule 6 (A), as follows. [His Lordship read Rule 6 (A) of the Rules of the Supreme Court (Ireland), March, 1897, and continued:—] It is clear that that Rule 6 (A), sub-rule (*a*), is not intended to be exhaustive. It means that, in addition to the matters then necessary under the existing judicature rule, it is essential to add these additional averments. Further on the rule says that the writ shall be in such of the forms in Appendix C, section VIII., as shall be applicable to the case. Form I. in that section differs from the form under the judicature rules to which I have referred, as it contains merely an allegation that the lands "are held," not that "*the defendant holds*" the lands. That is a remarkable departure from the previous form, and, in my opinion, must have been a deliberate one, with the view of obviating any necessity that might be thought to exist of setting out the devolution of the title of the plaintiff and defendant. In *Casey* v. *Hellyer* (1) it was held in England that the procedure on specially indorsed writs for recovery of land is to be confined to the simplest cases of landlord and tenant, where no devolution of title was involved. That case was the subject of discussion in this country in *Kane* v. *Brownrigg* (2), where it was held that *Casey* v. *Hellyer* (1) was decided on the basis of the English forms which were not applicable to the case then before the Court. This distinction between the procedure in the two countries is an almost necessary result of the judgment in *Barnes* v. *Barnes* (3), where it was decided that in a statement of claim in a case in which the lessor himself is plaintiff, it is unnecessary to state more than—1, a subsisting lease; 2, that the specified lands are held from the plaintiff under that lease; 3, that a year's rent is due; and, possibly, 4, that the defendant is in possession. In the case now before me the writ purports to be specially indorsed under the Rules of 1897, and this special indorsement contains all the allegations referred to in *Barnes* v. *Barnes* (3) as necessary in a pleading where the plaintiff is the lessor. I cannot see that the fact of the plaintiff not being the lessor can make any difference, inasmuch as the lands are alleged to be held "from the plaintiff." That,

(1) 17 Q. B. D. 97. (2) [1897] 2 Ir. R. 55. (3) 8 L. R. Ir. 165.

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in my opinion, is equivalent to a statement that the lessor's estate "came to and is now vested in the plaintiff." If the indorsement contained these very words I apprehend no exception could be taken to it on the ground that the various links in the devolution of the title were not set out. As to setting out the devolution of the lessee's interest, I cannot conceive how the necessity for it could arise in either a special indorsement, or a formal statement of claim. The question as to the necessity for setting out the plaintiff's title was raised in *Beaufort* v. *Ledwith* (1), but not decided. It was also raised in *Cullen* v. *Jackson* (2), but that was an ejectment on the title, and all that the Court decided was that the writ did not show any contract of tenancy between the plaintiff and the defendant.

I am therefore of opinion that the writ in this case sufficiently alleges—1, a subsisting lease; 2, that the lands are held under that lease, and, 3, that the plaintiff is the person entitled to recover the rent payable under that lease, and—with the other averments rendered necessary by the Rules of 1897—that it constitutes a specially indorsed writ, and that the plaintiff is entitled to judgment.

Solicitors for the plaintiff: *William Mooney & Son.*

Solicitor for the defendant: *Alfred Mac Dermott.* J. M'G.

Q. B. Div. 1898.

Dec. 10.

HAMILTON *v.* BLACK (3).

(1898. No. 16,276.)

Landlord and tenant—Breach of statutory conditions of tenancy—"Persistent waste"—Ejectment—Staying proceedings—Land Law (Ireland) Act, 1881 (44 & 45 *Vict. c.* 49), *sect.* 5; *sect.* 13, *sub-sect.* 4.

The plaintiff served a notice to quit on the defendant, his tenant from year to year under a "fair rent" order, for breach of one of the statutory conditions of his tenancy, waste by dilapidation of buildings, and instituted an action to recover possession of the holding. The defendant, who admitted waste, but alleged that any dilapidations had been repaired prior to the issue of the writ, moved to stay the action.

The Court ordered that the action should be stayed on the terms of the defendant paying the costs of the notice to quit (£1 1*s.*), and the costs of the motion (£5 5*s.*).

(1) [1894] 2 Ir. R. 16. (2) *Ib.* (3) Before O'BRIEN, JOHNSON, and BOYD, JJ.

MOTION to restrain proceedings in an action of ejectment, founded on notice to quit, for alleged breach of the statutory conditions of the defendant's tenancy. The defendant moved under sect. 13, sub-sect. 4, of the Land Law (Ireland) Act, 1881.

The original lessee of the holding had, in 1882, applied to have a fair rent fixed; and, by agreement between the parties out of Court, the fair rent was fixed at £43 10*s.* a year.

The defendant purchased the tenant's interest in 1888, and in June, 1897, caused notice to be served of intention to apply to have a fair rent fixed for a second statutory term. On the 21st July, 1897, he was served with a notice to quit, dated 10th July, 1897, the notice stating, as its ground, the violation of a statutory condition of the tenancy, viz., waste by dilapidation of buildings. The defendant alleged on affidavit, that this notice was the first complaint he had received in regard to any dilapidations; that the houses on the farm were erected by himself or his predecessor; that, however, upon receipt of the notice to quit, he had caused the premises to be put in repair; and that they were now in a better state of repair and condition than when he purchased them in 1888; and that all his repairs were carried out and completed in or before June, 1898, prior to the issue of the writ of summons. The application to fix the rent for a second statutory term had been adjourned pending the hearing of this present application. The writ of summons, claiming recovery of the lands in question, was dated 4th November, 1898.

William Moore, for the defendant:—

This is an application under sect. 13, sub-sect. 4, of the Land Law Act of 1881, to stay proceedings brought in ejectment for breach of a statutory condition. There can be no appreciable damage in the present case. A "judicial" tenant for a statutory term now holds practically *in perpetuum*, subject to periodical revision of the "fair rent"; and, if there be dilapidation, the landlord's damages are nominal: *Lombard* v. *Kennedy* (1); and *Metge* v. *Kavanagh* (2). But, in any event, the alleged dilapidations were here made good, after the notice to quit was served, and before the writ was issued; further, the buildings in this case are the property of the defendant, not of the landlord.

(1) 23 L. R. Ir. 1. (2) I. R. 11 C. L. 431.

Q. B. Div. 1898. HAMILTON v. BLACK.

Leech, for the plaintiff:—

The buildings in this case are the landlord's; but even assuming them to be the tenant's, it is none the less a breach of the statutory condition, to allow them to fall into disrepair, since this must diminish the security for the rent. If the Court is satisfied, on the evidence, that the dilapidation has been cured, I admit that the action should be stayed, but only upon terms of indemnifying the landlord as to costs.

William Moore, in reply.

O'BRIEN, J.:—

We are of all opinion, that where a tenant merely permits buildings on the holding to fall into disrepair, this is not "persistent waste," within the meaning of the statutory condition. "Persistent" means more than permissive or voluntary waste; and, read in conjunction with the other statutory conditions, it is evident that sect. 13 contemplates some positive acts by the tenant further than ordinary or permissive waste. However, in being asked to stay an action, we must assume, for the purpose of the application, that the action was properly brought; though, of course, the other matter could be availed of, if the parties went to trial. In the present case we think it sufficient to say, that in our view the landlord suffered no appreciable damage; but that he is entitled at the same time to be indemnified to some extent as to the costs incurred. In this we have the fullest powers under the concluding words of the section. We decline to express any opinion on the points argued before us, as to the rights of the plaintiff and defendant to the buildings on the holding. We allow the motion restraining the action, on the terms that the defendant should pay one guinea costs of the notice to quit, and five guineas costs of this motion. We do not give any costs of action.

JOHNSON and BOYD, JJ., concurred.

The order of the Court was as follows:—

"ON motion, &c., . . . the Court being of opinion that no appreciable damage has accrued to the landlord from the breach of the statutory

condition complained of, and the Court declining to express any opinion as to the ownership of the buildings referred to in this action, doth order that all further proceedings in this action upon the notice to quit be restrained and stayed; and it is further ordered that the defendant do pay to the plaintiff the sum of £1 1*s.* as and for the costs of the said notice to quit, and £5 5*s.* as and for his costs of this motion."

Solicitors for defendant: *Anderson & Co.*

Solicitors for plaintiff: *Crookshank, Leech, & Davies.*

A. E. R. J.

NORTON, TENANT; M'DONNELL, LANDLORD (1).

Landlord and tenant—Fair rent—Distinct and substantive part of property held under one demise consisting of demesne—The substantial part of such property—Separation of property into two parts—Diminution of value of landlord's interest—Head landlord—Land Law (Ireland) Act, 1896 (59 & 60 *Vict. c.* 47), *sect.* 5 (2).

Section 5, sub-section 2, of the Land Law (Ireland) Act, 1896 (59 & 60 Vict. c. 47), provides:—Where a distinct and substantive part of the property held under one demise is demesne land . . . and the Court consider that that part is not the substantial part of such property, the Court may if they are of opinion that, apart from the fixing of a fair rent, the separation of the property into two parts will not diminish the value of the landlord's interest therein, direct that that part shall thenceforth be . . . a separate holding and shall . . . be held at such rent during the continuance of the tenancy as the Court determine to be the proper proportion of the rent reserved by the demise, and the Court may fix a fair rent for the remainder of the property. . . . :—

Held, by the Land Commission that "the landlord's interest" in the property includes the interest of a head landlord.

Lands containing 530 acres and held under lease for one life were sub-demised for the same life. On an application by the sub-tenant to have a fair rent fixed, the Court were of opinion that 70 acres were demesne land. The mansion-house, and all the offices were on that portion—a dwelling-house but no offices being on the remainder.

On the facts of the case *held* by the Land Commission that, although the 70 acres were a distinct and substantive part of the property, they were not the substantial part of such property; but (principally on the ground that the buildings on the demesne portion were wholly in excess of its requirements as a separate entity, while the remainder was without any offices), that the separa-

(1) Before MEREDITH, J., and the Hon. GERALD FITZGERALD, Q.C., and LYNCH, Commissioners.

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NORTON, *Tenant;* M'DONNELL, *Landlord.*

tion of the property into two parts would diminish the value of the landlord's interest therein, that the case did not come within the sub-section, and that the originating notice should be dismissed :—

Held, by the Court of Appeal, that, under the circumstances, the separation of the property into two parts would diminish the value of the landlord's interest therein, and that the order of the Land Commission should be affirmed.

REHEARING of application by the tenant to have a fair rent fixed.

By his will dated the 8th December, 1812, Nicholas, Lord Baron Trimlestown, amongst other provisions, devised his property in the counties of Dublin, Kildare, Longford, and Roscommon, and elsewhere, being the Turvey or Kingsland Estate, to the use of his wife for life, without impeachment of waste, with remainder to the use of his son, the Hon. Thomas Barnewall for life, without impeachment of waste, with remainder to the use of Thomas Barnewall, only son of the said Hon. Thomas Barnewall for life, without impeachment of waste, with remainder to the use of the first and other sons of the said Thomas Barnewall in tail male, with remainder to the second and other sons of the Hon. Thomas Barnewall in tail male, with divers limitations over for life and in tail, and an ultimate remainder to the use of the testator's own right heirs. The will contained a leasing power as follows:— Provided also, and my will and meaning is, that it shall and may be lawful to and for all and every the persons respectively to whom or to whose use all or any part of the lands are hereinbefore limited for the term of their life and lives, when he or they shall respectively be entitled to the actual possession of such estates by virtue of the limitations aforesaid, by indenture or indentures under his, her, or their hands and seals, to demise or lease all or any part of the said lands, tenements, and hereditaments, to any person or persons for one life, or for any number of years, not exceeding twenty-one years, so as in every such lease the best and most improved yearly rent be reserved without any fine or income in respect thereof, and so as that in every such lease there be contained clauses of distress and re-entry for non-payment of the rent or rents thereby reserved, and so as of every such lease there be executed a counterpart, and so as none of such leases be made dispunishable of waste by any express words therein contained.

Lord Trimlestown died soon after, and was succeeded by the

said Hon. Thomas Barnewall. The latter made certain leases referred to in the judgment of Meredith, J. After his death his son Thomas succeeded to the title and the Turvey Estate, and by lease dated the 7th March, 1851, he demised to James Fagan the mansion-house, offices, and demesne lands of Turvey, containing 70 acres statute measure or thereabouts, and that part of the lands of Turvey, late in the possession of Mr. John Smyth, containing 277 acres like measure, for the life of Prince Alfred, second son of Her Majesty, or twenty-one years, at the rent of £410. This lease which contained covenants and other provisions nearly the same as those in the lease next referred to was surrendered on the 5th August, 1858.

On the 5th August, 1858, Thomas, Lord Trimlestown, made a new lease to the said James Fagan of the 70 acres, and 277 acres, leased in 1851, and also of additional lands containing about 139 acres, at a rent of £576.

This lease is stated fully in the judgment of Meredith, J.

Fagan's interest became vested in William M'Donnell, and he in 1873 made a sub-lease to Patrick Richard Norton of the premises comprised in the lease of 1858. On the 17th September, 1877, the sub-lease of 1873 was surrendered, and a new sub-lease was made by M'Donnell to Norton of the same premises for one hundred years, if the Duke of Edinburgh should so long live, at a rent of £1031 11*s.* 3*d.* See the judgment of Meredith, J., as to these sub-leases.

The mansion-house and all the offices were on the 70 acres portion—a dwelling-house, but no offices being on the remainder.

Soon after the passing of the Land Law (Ireland) Act, 1887 (50 & 51 Vict. c. 33), Patrick Richard Norton applied to have a fair rent fixed. Christopher Barnewall, then the owner in fee of the head interest, obtained leave to intervene in the proceedings. Norton's originating notice was dismissed on the ground that portion of the holding was demesne land.

The Land Law (Ireland) Act, 1896 (59 & 60 Vict. c. 47), having become law, Norton served on Ellen M'Donnell, who had become entitled to William M'Donnell's interest, a new originating notice, dated the 16th October, 1896, of application to have a fair rent fixed for the entire holding.

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NORTON, *Tenant*; M'DONNELL, *Landlord.*

On the 17th March, 1897, an order was made by a Sub-Commission giving liberty to Nicholas Coppinger and Henry Aylmer, trustees of the will of Christopher Barnewall, then deceased, to intervene. H. Aylmer died in the same year.

On the 28th April, 1897, a Sub-Commission, by whom the application to fix a fair rent was heard, made the following order:—"The lessee having on the 23rd day of October, 1896, duly served an originating notice of an application to the Land Commission in the prescribed manner for an order fixing the fair rent to be paid for the holding therein mentioned, the particulars of which holding, as stated in such notice, and of the lease under which he holds as therein stated are contained in the schedules indorsed hereon, and a distinct and substantive part of the property held under the said lease being demesne land, that is to say, that part of the said property which is called Turvey Demesne, containing 70 acres or thereabouts.

"We, the undersigned, forming a Sub-Commission, after hearing the parties, and, having regard to the interest of the landlord and tenant respectively, and considering all the circumstances of the case, holding, and district, Do hereby direct that Turvey Demesne shall henceforth be a separate holding, and shall be held during the continuance of the tenancy under the said lease at the rent of £180, which we hereby determine to be the proper proportion of the rent reserved by the said lease. And we fix and determine that the fair rent of the remainder of the property held under the said lease is the annual sum of £605.

"And we do certify that the landlord at the hearing required that the right of sporting as mentioned in the 5th section of the Land Law (Ireland) Act, 1881, shall belong exclusively to him."

Each of the three parties required the case to be reheard by three Commissioners sitting together—Norton, on the ground that the rent fixed for "the remainder of the property" was excessive; Ellen M'Donnell, on the grounds (amongst others) that the Land Acts did not apply to the holding because (*a*) a substantial part of the holding was demesne land, and (*b*), apart from the fixing of the fair rent the separation of the property into two parts would diminish the value of her interest therein; and the head landlord, on the grounds that the lands were demesne; that they were let

to be used mainly for the purpose of pasture; that apart from the fixing of the fair rent the separation of the property into two parts would diminish the value of the landlord's interest therein; that the head lease was made by a limited owner in respect of a holding, the substantial part of which, at the date of the letting, was demesne land; and that the application of the Land Law Acts to the holding would materially diminish the value, as a residence, of the mansion-house thereon.

The other facts of the case and the material portions of the evidence will appear from the judgment of Meredith, J.

The Right Hon. The Mac Dermot, Q.C., and *T. M. Healy*, for P. R. Norton, relied on the provisions of the lease of 1858 as showing that the lessor therein had himself provided for the severance of the holding. They contended that "landlord" in sub-section 2 meant immediate landlord only, and that the value of the immediate landlord's interest would not be diminished—she would still have a profit rent, and in any case, her interest would end on the death of the Duke of Edinburgh.

Matheson, Q.C. and *Oulton* for Ellen M'Donnell, contended that, having regard to the previous dealings with the property, it was all demesne; that in any case the demesne proper was the substantial part of the holding; and that the value of Miss M'Donnell's interest, apart from the fixing of a fair rent, would be diminished in value by the separation of the property into two parts, because (1) practically all the buildings were upon the portion described as demesne, and were in excess of the requirements of that portion, while the remainder was without buildings, and (2) having regard to the circumstances relating to the demesne and mansion-house, that portion would not be proper security for the apportioned rent placed upon it.

Campbell, Q.C., Cherry, Q.C., and *Chaytor*, for Nicholas Coppinger, contended that the entire holding was demesne; that at least the substantial part of it was demesne, having regard especially to the lease of the 12th May, 1838; that the word "landlord" was not to be restricted to immediate landlord, referring to *Seymour*

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v. *Quirke* (1), and the Landlord and Tenant (Ireland) Act, 1870 (33 & 34 Vict. c. 46) s. 70, and Land Law (Ireland) Act, 1896 (59 & 60 Vict. c. 47) s. 48; and that the head landlord's interest would be diminished in value.

March 7.

MEREDITH J.:—

In this case of Norton *v.* M'Donnell, the originating notice bears date the 16th October, 1896, and was served by the lessee, Mr. Patrick Richard Norton on his immediate lessor, Miss Ellen M'Donnell. The claim of the lessee is to have a fair rent fixed in respect of the holding described in the originating notice as the lands of Turvey, containing 530A. 3R. 39P., statute measure, held at the yearly rent of £1031 11*s.* 3*d.*, under a lease dated the 17th September, 1877, from William M'Donnell to Patrick Richard Norton, for the term of 100 years if the Duke of Edinburgh should so long live. The poor law valuation of the holding is £545. On the 17th March, 1897, a sub-commission, of which Mr. Doyle was chairman, made an order giving liberty to the head landlords, Mr. Nicholas Coppinger and Mr. Henry Aylmer, trustees of the will of Christopher Barnewall, deceased, to intervene on the hearing of the lessee's application; and on the 28th April, 1897, the following order was made under section 5, sub-section 2 of the Act of 1896 by the same sub-commission. [His Lordship read the order.]

Notice of rehearing was served by each of the parties, and in the case of the head landlord leave to amend by adding further grounds of appeal was given and acted upon. All the parties were represented on the rehearing by counsel, and the difficult questions of law and of fact involved in the case were very fully debated. The holding comprised in the lease of 1877 is situate within a short distance, 1½ miles, of the railway station of Donabate, county Dublin. It forms part of the estates known as the Turvey or Kingsland Estates of the Barnewall family. The earliest document given in evidence is the will of Nicholas, Lord Trimlestown, who died in 1813. The testator, who was owner in fee of the estates in question, by his will which bears date in 1812, devised all his real estates to trustees and their heirs to the uses and upon the trusts

(1) 14 L. R. Ir. 97, 455.

in his will mentioned. It is unnecessary to go through the will at any great length; it is sufficient to say that the lands comprising the Turvey or Kingsland Estate described by the testator as "all my lands, tenements, and hereditaments, and advowsons whatsoever in the counties of Dublin, Kildare, Longford, and Roscommon, and elsewhere being the Turvey or Kingsland Estate," were limited by the will to the use of the testator's wife for her life without impeachment of waste, with remainder to the use of the testator's son, described in the will as The Hon. Thomas Barnewall, for life without impeachment of any manner of waste, with remainder to the use of Thomas Barnewall, described by the testator as the only son of the said Hon. Thomas Barnewall, "and my grandson," for his life without impeachment of waste, with remainder to his first and other sons in tail male, and a long series of remainders over. The head landlords now before the Court claim under the will of Christopher Barnewall, a distant relative of the testator who (owing to the failure of several intermediate limitations) became tenant in tail under the will and barred the entail. Attention was called by counsel on both sides to the numerous tenants for life contemplated by the will, and to the leasing power which is as follows:—[His Lordship read the power.]

The next document to which I shall refer is a lease of the 12th May, 1838, made between the Right Hon. John Thomas Lord Trimlestown, described as of Trimlestown Castle in Ireland, of the one part, and Richard Smyth, of Lisson Hall, in the county of Dublin, Esquire of the other part. By this lease John Thomas Lord Trimlestown, who was the same person as the Hon. Thomas Barnewall, son of the testator, and tenant for life under his will, demised to Richard Smyth part of the lands of Turvey, "inside of the demesne of Turvey, east of the mansion-house, containing 100 acres or thereabouts, be the same more or less, as in the possession of the said Richard Smyth and his father, the late Joseph Smyth, for several years, and that part of said lands of Turvey, formerly called Bryan's farm and Ryefield, containing 71 acres or thereabouts, be the same more or less," to hold from the 1st May, 1838, for the life of Arthur Charles Ducat, then stated to be eight years old, or for thirty-one years. It is to be observed that so far as the term of years is concerned, the lease of the 12th May,

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would appear to be in excess of the power contained in the will of 1812. This lease is on a printed form, and contains no special covenants. The acreage is stated in I. P. M. Three days afterwards, namely on the 15th May, 1838, the same tenant for life, John Thomas Lord Trimlestown, executed a further lease dealing with the lands of Turvey. The parties to the lease are Lord Trimlestown of the first part, and Richard Farrell, of North Great George's-street, Dublin, of the other part. The parcels in the lease of the 15th May are described as follows, and to their description we attach the greatest importance in this case:—"All that and those the dwellinghouse, offices, garden and demesne lands of Turvey, containing 40 acres or thereabouts (which includes the land on which the timber trees stand), according to the late Irish plantation measure, situate lying and being in the parish of Donabate, barony of Balrothery and county of Dublin aforesaid, except and always reserved to the said John Thomas, Lord Trimlestown, and his assigns, for and during the term of his natural life, and from and after his decease, unto the person and persons, who for the time being shall or may be entitled to the rent and reversion of and in the said demised messuage, tenements, lands, and hereditaments, all timber and other trees, wood and underwood standing, growing, or to be planted thereon, as well as all mines, minerals, quarries and other royalties." The term is twenty-one years from the 21st May, 1838, the rent £120 per annum. The original of the last-mentioned lease bears an endorsement dated the 19th February 1840, made between Thomas Lord Trimlestown, described in the endorsement as the son and heir of the lessor, John Thomas Lord Trimlestown, then lately deceased, and the said Richard Farrell, to the effect that the lease in question should cease and determine on the 1st May, 1847, and that the said Richard Farrell should be at liberty to determine the lease on the 1st May, in any intermediate year by serving a six months' notice to that effect. The next document of importance is the lease of the 5th August, 1858, which has been so much discussed and canvassed in the present case, made between the Right Hon. Thomas Baron Trimlestown, and James Fagan of Turvey House, in the county of Dublin, Esq. This lease and the map endorsed in the fold of it are of so great importance in the case that it will

be necessary for me to refer to the document at some length. Now the parcels are described in this way:—"All that and those the mansion-house, offices and demesne lands of Turvey, containing 70 acres or thereabouts, that part of the lands of Turvey formerly in the possession of Mr. Richard Smyth, containing 277 acres or thereabouts, that part of the lands of Turvey, late in the possession of Patrick Brien, containing 136 acres or thereabouts, and one other part of the said lands of Turvey, late in the possession of Thomas Monks, containing 3 acres or thereabouts, all which lands containing in the entire 486 acres British statute measure"—I may say that the acreage, which is agreed upon and has been ascertained by survey, is at least 530 acres statute—"are now in the possession of the said James Fagan, and are delineated, bounded and described as in and by the map endorsed hereon and are situate," &c. There is an exception of the timber and timber trees now growing on the demise, with liberty to remove and cut down and carry away the same, making reasonable compensation for damage to be thereby occasioned, and there is a reservation of mines, minerals, and quarries. The term is for the life of His Royal Highness Prince Alfred, second son of Her present Majesty, or twenty-one years from the 1st November, 1854, the rent £576. There is a covenant, to which The Mac Dermot called attention and upon which he laid some stress, by the lessee that he should and would "from time to time during the continuance of this demise make into dung all the straw which shall grow upon the said demised premises, and lay out and spread, and at the most proper times and in a husbandlike manner, upon the lands hereby demised the whole of the dung, manure, or compost that shall from time to time be made thereon, and properly cultivate, use, farm, and manage the said hereby demised premises, in all respects in a fair and husbandlike manner according to the approved rules and methods of good husbandry." There is also a covenant by the lessee that he will "during the continuance of the demise well and sufficiently preserve, uphold, maintain, and keep the said demised lands and premises respectively and the mansion house of Turvey and all other the houses, offices, edifices, and buildings, and all fences, hedges, gates, dykes, ditches, drains, and watercourses, plantations, enclosures and im-

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provements whatsoever made on the said lands and premises, or any part thereof, in good and sufficient tenantable order, repair and condition, and at the end of the term hereby granted or other determination" yield up the same. There is then a covenant which is relied on by the lessor as of great importance. "And the said James Fagan doth hereby for himself . . . agree . . . that he . . . shall not make or build or cause to be made or built any dwellinghouse or habitation or other building on the said lands or either or any of them, save and except what may be necessary for the reparation and improvement of the out-offices on the said demesne lands of Turvey, without the written consent of Thomas Lord Trimlestown, his heirs or assigns, or other the person or persons" aforesaid There is a covenant by Mr. Fagan, not to plough or break up or convert into tillage, any part of the said demesne lands of Turvey, consisting of 70 acres, except such parts as are at present used for the purpose of gardens or orchards; and then there is an important provision—"And it is hereby declared and agreed by and betweeen the parties hereto that it shall and may be lawful to and for the said Thomas Lord Trimlestown, his heirs or assigns, *at any time within one year next after the expiration of the term of twenty-one years hereby granted*, to re-assume the possession of the said mansion-house, offices and demesne lands of Turvey, containing as aforesaid 70 acres statute measure or thereabouts, if he or they shall be minded so to do." In the event of the resumption taking place the rent of £576 is to be reduced to the yearly rent of £466, which shall be the rent payable by the said James Fagan "for and out of the said other lands, containing 418 acres statute measure." And it is declared that James Fagan "shall not as against the said Thomas Lord Trimlestown, his heirs or assigns, set up or make any demand or claim any payment, allowance, abatement, or other compensation for or on account of any repairs, additions, or improvements he may have already made, or which he or they may hereafter make, or cause to be made on, in, or to the out-offices, or on, in, or to the mansion-house on said demesne lands of Turvey, or in the draining or improving of the said demesne lands beyond the said sum of £300," which was agreed to be allowed to him in the event of the resumption taking place and his executing improvements.

There is a covenant against subletting and alienation and the other usual covenants contained in the lease. Now in the fold of that document there is a map of the lands of Turvey referred to in the lease, and my colleagues and I consider that map of the greatest importance and of the greatest aid and assistance to us in determining the rights of the parties with regard to one of the most important questions argued in the case, namely, the question of the extent of the demesne lands comprised in that lease. James Fagan, the lessee in that lease, died on the 12th January, 1862, having made his will by virtue of which the lands comprised in the lease vested in William M'Donnell. On the 4th March, 1873, William M'Donnell made a sub-lease of the premises comprised in the lease of 1858 to the tenant who has served the originating notice in the present case, Mr. Patrick Richard Norton, who is described in the lease of 1873, as of Lower Dominick-street, in the City of Dublin. This lease is modelled, so to speak, on the lease of 1858, and the document brings home to the lessee complete notice of the lease of 1858, and of the provisions with regard to demesne and resumption.

I will not go through the provisions of the lease of 1873 because they constitute practically an echo of the provisions of the head lease of 1858. On the 17th September, 1877, two further deeds between William M'Donnell and Patrick Richard Norton were executed, one of which is the lease referred to in the originating notice, and the other an assignment to Norton of M'Donnell's rights to compensation for improvements under the Land Act of 1870. It is unnecessary to refer at any length to the intermediate dealings which have taken place between M'Donnell and Norton. It appears from the lease of 1877 that Mr. M'Donnell had borrowed money from Mr. Norton, and that in consideration of that and of the assignment of Mr. M'Donnell's rights in respect of compensation for improvements, the rent in the lease of 1873 is reduced by the lease of 1877 to the present rent of £1031 11*s.* 3*d.* There are some differences between the leases of 1873 and 1877, but I do not think that any of these differences are material to the decision of the present case. The consent of the landlord to this sublease, as also to the earlier sublease of 1873 was duly given.

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Before dealing with the questions arising under the Act of 1896, I should mention that after the passing of the Land Act of 1887, Mr. Norton served an originating notice which came before a Sub-Commission Court, but which, as far as I know, was not made the subject-matter of an appeal or rehearing. This originating notice was on the 19th April, 1888, dismissed by the Sub-Commission Court on the ground which was then sufficient to determine the case, viz. that a part of the holding was demesne land.

Now, upon one point argued before us there seems to be no room for doubt,—the Sub-Commissioners in their order declare that a distinct and substantive part of the property held under the lease of 1877 is demesne land, namely, that part known as Turvey Demesne, containing 70 acres. Mr. Norton did not, and indeed, could not challenge that finding, and we all think that a plainer case of demesne *quoad* the 70 acres can hardly be conceived. The map upon the lease of 1858, which is practically incorporated in the lease of 1873, the frequent references in both documents to "the demesne lands of Turvey, containing 70 acres," the covenants and provisions with respect to the mansion-house, leave no room for doubt upon the question that as to these 70 acres at all events, they are demesne. But the landlords go further; they contend that the demesne land comprised in the holding is not merely a distinct and substantive part of the property, but that it is *the substantial part*. They rely on the description in the lease of the 12th May, 1838, as affording an almost conclusive indication that in 1838 the 100 acres east of the mansion-house were inside the demesne of Turvey. They argue that inasmuch as the lease of 1838 and the lease of 1858 were made by tenants for life it is not possible for the Court to entertain the theory of undemesning. The Mac Dermot and Mr. Healy, on the other hand, contend that there is no sufficient evidence that the 100 acres was or is demesne within the meaning of the Act of 1896, and further, that the leasing power in the will of 1812 is almost enough in itself to enable the tenant for life to undemesne. Both sides refer to the 10th section of the Act of 1896. In the view we take of the facts, it is unnecessary to enter on the difficult question of the power of a tenant for life to undemesne, or the bearing of the 10th section

upon such cases as *Moloney* v. *Hamilton* (1). We are of opinion that there is not sufficient evidence before us to bring the 100 acres east of the mansion-house within section 5, sub-sect. 1 (*b*) (ii) of the Act of 1896. If we are to go behind the safe starting point of the lease of 1858, and the strong evidence (in favour of the tenant on this point) afforded by the map endorsed on the lease—if we are to go behind that starting point for the point of time when the land "was first demised" we are, no doubt, met by the description in the lease of the 12th May, 1838. But description is not demonstration, and to my mind the force of the words "inside the demesne" contained in the lease of the 12th May is nullified by the description of the "demesne lands of Turvey" in the lease of the 15th May, three days later executed by the same lessor. Besides the 100 acres were not let for the first time on the 12th May, 1838,—they had been made the subject of separate lettings previously; the lease of the 12th May describes them as "in the possession of the said Richard Smith and his father the late Joseph Smith for several years." There is considerable latitude in a "several," and on this point the oral testimony deserves consideration. The recollection of Charles M'Allister who was examined on behalf of Mr. Norton, who described himself as a gentleman at large, extends back to 1831, in which year the Hon. Thomas Barnewall, afterwards Lord Trimlestown, lessor in the lease of 1838, came to reside at Turvey. He was the last of the Barnewalls who resided there. All the lands outside the demesne of 40 Irish acres or 70 statute acres were in the hands of tenants. Richard Smyth (the witness says), had the principal portion of the land round the demesne; all the lands that Mr. Norton now has except the demense portion, 40 Irish acres, was in the occupation of tenants; and in answer to Question 265, he attempts to pursue the matter beyond the confines of legal and legitimate evidence; for in cross-examination he states that Smyth "was a tenant of the lands before I," that is, the witness, "was born." On the other hand, however, it is right to mention that Thomas Sweetman who is the local postman and, I understand, continues to discharge his duty as such at the age of 84, repeatedly

(1) Mac D. 231.

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asserts that Smyth was tenant of portion of the demesne outside the 40 acres; he calls the 40 acres "the wood," and insists that Smyth had the rest of the demesne outside the wood. How long before 1831 had the Smyths become tenants of the 100 acres it seems to us impossible to say. Why are we bound to assume that the separation of the 100 acres from the 40 acres was made for the first time by a tenant for life? When did Joseph Smyth, the father of the said Richard Smyth, first become tenant of those 100 acres?

On the entire evidence, oral and documentary, we hold that the landlord has failed to establish that in the years 1838 or 1858 the 100 acres were part and parcel of the demesne lands of Turvey, and constituted demesne lands within the meaning of the Act of 1896, and we decide in favour of the tenant upon this point. This disposes of the several arguments resting upon the basis that *the substantial part of the property* is demesne land, for it was not argued, and on the facts and figures we think it would have been impossible to argue that the mansion house and demesne of 70 acres constituted *the substantial part* of the property. I pass by the pasture point raised in the head landlord's notice of rehearing, with the observation that it was not seriously argued, and could not, in our opinion, have been sustained in argument. I come now to the last point, and the most difficult point argued on behalf of the landlords. Will the separation of the property into two parts, demesne and non-demesne, apart from the fixing of a fair rent, diminish the value of the landlord's interest therein? This appears to us to be the real question for determination. The order of the Sub-Commission proceeds on the basis that the answer to this question is in the negative; their order does not say so, but section 5, sub-section 2, under which the order is made, confers jurisdiction in that event only. On the part of the tenant it was urged with much force that on this question the head landlord should not be permitted to intervene, that the words in section 5, sub-section 2, "the landlord's interest therein" must, having regard to the definition of the word "landlord" in the code, mean the interest of the immediate landlord, Miss M'Donnell, and as regards the M'Donnell interest no possible injury can accrue to the landlord from the fixing of a fair rent, inasmuch as the tenant is a solvent

and substantial tenant, who, during the continuance of the tenancy, under the lease of 1877, must be and will be a mark for the proper proportion of the rent reserved by the demise in respect of the demesne portion of the holding. We were greatly impressed during the hearing by this argument, but further consideration leads us to think that it is impossible to ignore the interest of the head landlord, having regard to the decision in *Seymour* v. *Quirke* (1). I attach great weight to the use of the word "property" throughout the section, and I am of opinion that the term "landlord's interest in the property" must include the interest of the head landlord. Our attention was directed by Mr. Cherry to other sections of the Act of 1896, in which the word "landlord" includes not merely the immediate landlord, but the head landlord. But apart from this it seems to us that the tenant's contention ignores the distinction between the value of the landlord's interest in the property and the security for the landlord's rent, two distinct things. The security at present seems unimpeachable, but no one is above the vicissitudes of fortune, and in the end I think the meaning of the sub-section must be, Will the holding, if separated into two parts, and possibly held by different tenants, be as valuable (always apart from the fixing of a fair rent) as it is in its united condition? I pause to observe on the words of the section, which are, "will not diminish the value." In the section where "substantial" and "substantially" are employed with so much emphasis, there is no word qualifying the language "diminish the value of the landlord's interest." I cannot help thinking that the Legislature only intended the sub-section to have effect in cases where the two parts of the property were so separate and distinct as to negative any real and appreciable, as distinguishable from any nominal or fanciful, diminution of value arising from separation. My colleagues and I are of opinion that the question in the present case as to the diminution of value by reason of the inadequacy of the water supply outside the demesne is fairly met by the evidence as to the pumps made or maintained by the tenant, nor do we lay stress on the fact that the separation would mean taking what has been called a bite out of the centre of what forms at present a compact holding. The real difficulty

(1) 14 L. R. Ir. 455.

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arises in respect of the buildings. On this large property of 530 acres the only building outside the demesne portion is a two-storey dwelling-house, which is occupied at present by Mr. Norton's herd. There were at one time offices attached, which were built of mud and have crumbled to decay. On the demesne portion stands the mansion-house, with offices adequate and suitable to the requirements of a property comprising the large area of 530 acres, but wholly in excess, according to our view of the evidence, of the requirements of the demesne portion, regarded as a separate entity.

I must refer to the evidence upon this branch of the case. The poor law valuation of the buildings upon the demesne portion I should state is £41; the buildings upon the demesne portion consist of the mansion-house, a barn slated and lofted, stables slated and lofted, a car-house, cow-house, and long cattle range. Now Mr. Barnes, who was examined on behalf of the immediate landlord, is asked what valuation he put upon the buildings. "I put £58 on the buildings"; that is the buildings upon the demesne portion. "On the demesne portion I valued 70 statute acres; my valuation on the land is £108 15*s.*, that is my own valuation, not the apportionment. I put £58 on the buildings." "What offices are there," he is asked, "in the portion outside the demesne?" "There is no house on the outside portion except the steward's house, but there are extensive offices on the demesne," and he enumerates them then as a barn slated and lofted, which he valued at £100, a cow-house slated, £80, and stables, slated and lofted, £250. "Are these stables suitable to the place as a mansion-house?" "Some of them were, and some of them were used for farming. There is a car-house and cow-house, £200, and there is a long cattle-shed, £100. I estimate the total value at about £750 on the offices; these are the out-offices, the yard-offices."

"Are these suitable to the whole farm, taking the demesne-land and the outside portion together; are they suitable for the farm?" "For both together they are."

"Suppose they were separated into two parts, the 70 acres by itself, and the other portion by itself, would these buildings be useful or suitable to the 70 acres?" "Portion of them would be, but they are far in excess of the requirements. They would be unduly large on the smaller portion. You would have none at all

on the larger portion, and you would have an excess on the smaller."

He was asked on cross-examination by Mr. Healy, "Whom do you say it would be a very serious injury to?" "I say it is a serious thing to the owners of the two farms." And one other answer he gave to which I will refer—"If it were let to any person near Dublin, would the buildings be equally valuable with 60 acres as with 250 acres—would they in your opinion?" "I don't think they would, the farm buildings I consider in excess of 70 acres."

Now I don't pause to go through the evidence of Mr. Bellaney, who was also examined for the same landlord, but he is asked one question, 451:—"If the demesne were separated from the rest of the holding, in your judgment would it injure the landlord's interest in it?" "Most decidedly, for the reason that the buildings in the case of the demesne would be perfectly superfluous, and the other portion, the main portion, having no buildings at all, would be very inconvenient."

The evidence of the valuers who were examined on behalf of Mr. Norton, that is Mr. Barrington and Mr. Radcliffe, so far as affecting this point, may be shortly referred to. At Question 328, Mr. Barrington is asked: "What is the valuation of the demesne?" "It is 70 acres, £102 11*s.* 3*d.* on the land. I put more on the land than the Sub-Commission. I put a great deal less on the house, £27 10*s.*, and I respectfully say that they made a great mistake to put the enormous rent of £70 or £80 on that house."

Question 335. "One other question. Would the separation of the demesne-land from the other portion be any injury to it in its working?" "None; I should say it would be rather an advantage under the existing agricultural conditions, because anybody taking such a holding would prefer taking the holding—I would prefer it—without the house and offices, if the covenant to repair was enforced, because it is now a grazing farm, a good pasture farm, and I don't think the buildings are necessary. I think any advantage of them, which undoubtedly is a real advantage for stacking hay, is more than counterbalanced by the disadvantage of keeping the old house in repair."

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And on cross-examination, "Do you think the middle part could possibly be used by itself, if you take away the other parts?" "I do, most certainly; but if you have to keep that old building in repair, it would diminish the profits of anything you had along with it."

"Would it not be impossible to keep up the house and out-offices, with a mere 70 acres of land attached to them?" "I don't say it would be impossible; you can keep them up, but it would not be profitable. It would not be profitable to do it if you had the whole of it."

Mr. Radcliffe, the second valuer for the tenant, is asked:—"Would it not be a great disadvantage to have the 70 acres separated?" "Well, I think you could not keep up the house on the 70 acres." "You would not take the 70 acres?" "The land is as useful as ever, if you could knock down the house." "You think, as a result of the separation, the value of the house and offices on the land will be completely destroyed?" "I would not say completely: it would certainly make them less."

That is the evidence of the valuers for the tenant; and there is only one other witness examined upon this question, who was examined on behalf of the head landlords, Mr. Frank North. His evidence is not very strong or clear, I think, upon this point. He is asked:—"Would you find it harder to let this house with the 70 acres only, than if it had 300 or 400 acres around?" He says, "I think I would." "Why?" "I found the house requiring a large extra expenditure, in my opinion, to make it habitable; and, in my opinion, I am not quite sure I would recommend the owners to spend that money on a house with only 70 acres." "Is that a hunting district?" "They hunt from it, but it is not the centre of a hunting district; it is not such a district that the house alone would attract people to live there, it would be necessary to have the land." "It would not do as a hunting box?" "I don't think so."

Question 498. He says:—"I don't for a moment say I could not let the house with 70 acres of land, but I do say I could let it very much more readily with a large quantity of land;" and further on he says:—"I don't know about his being happy or unhappy; but I do know, that if I had the place in the market,

with the different quantities of land; the larger quantity of ground would more readily let than the smaller quantity." However, it appeared he had not had very extensive personal opportunities of judging of that particular matter; and the evidence certainly of Mr. Barnes and Mr. Bellaney, and of the two valuers, who were examined on behalf of the tenant, seems to us more clear and conclusive upon this point than the evidence of Mr. North. I should say with reference to the question asked on cross-examination of Mr. North, as to the suitability of these 70 acres, with the mansion-house as a hunting box, that was a suggestion repeatedly thrown out in cross-examination, but it was not adopted by Mr. North, or by any of the witnesses; and there is no evidence before us to satisfy our minds that the 70 acres, with the buildings upon it, could be set profitably, or in its present condition, merely as a hunting box. Now, it is impossible to speak with certainty in a case of this description—the question is really one of great difficulty, and rendered still more difficult by the leases, and the dealings of the landlord with the property. In the result, however, the evidence has satisfied us that the separation of the property into two parts would diminish the value of the landlord's interest in two ways, one holding, the larger, would be left without any offices at all, which could not fail to be injurious to it, if worked as a tillage farm, and must to an appreciable extent, at all events, diminish its value as a grazing farm. The remaining portion would be overweighted with buildings far in excess of its requirements or possible development. For these reasons, we have arrived at the conclusion that the case does not come within the second sub-section of sect. 5; and we must, therefore, reverse the decision of the sub-commissioners, and dismiss the originating notice. My colleagues have requested me to add, what I think is, perhaps, obvious from what I have already said: that we consider the case one of the greatest difficulty, and that we only arrive at the decision which I have announced, after a great deal of consideration, and, I might almost add, hesitation.

D. M'C. M.

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NORTON, *Tenant;* M'DONNELL, *Landlord.*

June 15, 16.

Norton appealed to the Court of Appeal (Lord Ashbourne, C., and Fitz Gibbon, Walker, and Holmes, L.JJ.) :

Henry, Q.C., and *T. M. Healy* (with them *The MacDermot, Q.C.*), for the appellant :—

The provisions of the Act of 1881 as to demesne land have been repealed by the Act of 1896, and sect. 5 of the Act of 1896 has been enacted instead. We submit that this case comes under sect. 5, sub-sect. (b) (ii) ; it cannot be contended that this holding consists substantially of demesne, when 70 acres out of 500 is the entire of the demesne part. We say that the Sub-Commission should have fixed a fair rent for the whole, and not have split the holding into two. On the 16th October, 1896, the tenant served an originating notice as against Miss M'Donnell. After the Sub-Commission fixed the fair rent, Miss M'Donnell appealed, on the ground that her interest was injured by the severance ; the Miss Barnewalls came in seven months after and served the same notice of appeal.

We submit that Miss M'Donnell was the "landlord" either in sub-sect. 1 (b) (ii) or in sub-sect. 2 of sect. 5. By the definition section of the Act of 1881 (sect. 57), "landlord" means the "immediate landlord," and by sect. 37 of the Act of 1887 the term includes a trustee for sale and a limited owner. Landlord means immediate landlord in every section of the Act of 1896, except the purchase sections. Where the Legislature desired to deal with the superior landlord, it did so by employing fit and proper words, sects. 11 and 12 ; in sect. 13 it speaks of the "immediate landlord." Sect. 17, which deals with the case of limited owners, and mortgagors, and mortgagees in possession, can only refer to the immediate landlord. Sect. 40 speaks of the "owner of the estate," and by sect. 42 a mortgagee in possession with power of sale, shall be deemed to be a landlord.

Assuming, then, that "landlord" means the immediate landlord, the words "when first demised as demesne" mean demised by Miss M'Donnell. The words "first demised as demesne" were inserted in the statute in consequence of the decision in *Magner* v. *Hawkes* (1). These lands were not demised as demesne by Miss

(1) 32 L. R. Ir. 285.

M'Donnell; then there is the other qualification which is cumulative, "and which the contract of tenancy, or the circumstances of the case show was intended to be preserved as demesne or resumed as demesne by the landlord." That does not exist as a fact in this case at all, because Miss M'Donnell never intended to return to the house as her residence: she had parted with all she possessed in this property in consideration of a rent.

Sub-sect. 2 of sect. 5 is in ease of the landlord. Once the tenant shows that he is entitled to fix a rent for the whole under sub-sect. 1, the landlord can come in and ask that the two parts may be separated. There is no injury to the value of the landlord's interest here. She has got a solvent tenant in possession, who is restrained from alienating by the covenants in the lease. Apart from fixing the fair rent, there is nothing to diminish the value of the landlord's interest in the property. As for the buildings, the herd's house is quite sufficient for the remainder of the farm, and the agricultural portion of the lands could be worked by the tenant without the addition of further buildings.

Matheson, Q.C., and *Oulton*, for the middleman; and *Campbell, Q.C.*, *Cherry, Q.C.*, and *Chaytor*, for the head landlord, were not called on.

LORD ASHBOURNE, C.:—

June 16.

We do not think it necessary to ask for further assistance in this case, after hearing the able and clear arguments which have been addressed to us, and having also had ample opportunity of considering the whole matter, the cases and authorities to which we have been referred. The case is an interesting one, turning on the construction of the fifth section of the Act of 1896, under a state of facts as to which practically there is no controversy. It appears that Mr. Norton, a respectable gentleman, of good position and means, has become tenant of part of the Trimlestown property, and that a considerable number of years ago, in August, 1838, a lease was made of part of the Trimlestown property by whoever was entitled to represent it at that time to Mr. Fagan for the term mentioned. It amounts to some 500 acres,

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comprising one of the mansion houses of the Lords Trimlestown, with a map on it which shows that as to 70 acres, at all events, it was demesne and was demised as such. The rest is also marked on the map, and the portion demised as demesne ran straight into the centre of the property, and at one part almost extended to the confines of the property. Fagan died, and left his interest by will to Miss M'Donnell, and it appears that by leases of 1873 and 1878 Miss M'Donnell demised the farm for her own term to Mr. Norton, who is the present tenant. It appears that in 1888 Mr. Norton applied to the Land Commission to have a fair rent fixed, and that application was dismissed on the ground that portion of the land was demesne.

In consequence of the passing of the Act of 1896 he commenced fresh proceedings, and of course we have to consider this case by the light of the provisions of the Act of 1881, as affected by the Act of 1896. The whole case really turns on the construction of sect. 5 of the latter Act.

I gather from the judgment of Meredith, J., which I have read most carefully, that when the case was discussed before him, counsel for both the head landlord and Miss M'Donnell argued that on the construction of sub-sect. 1 (b) they were entitled to have the originating notice dismissed, and they argued that the tenancy was one in a holding which substantially consisted of demesne and excluded as coming within sect. 5, sub-sects. 1 (b) ii. Meredith, J., and his colleagues gave no assent to that contention, but treated the case as coming within sub-sect. 2 of sect. 5. Mr. Healy has founded upon the decision that the holding was not excluded as substantially consisting of demesne, a vigorous contention that that really involved giving to the tenant a right to have a fair rent fixed under sub-sect. 1 (b), and that he was entitled practically to ignore sub-sect. 2. Mr. Healy did not, indeed, in terms, say we should ignore it, but practically this argument would have that effect. In my opinion that contention is unfounded, and I think that the section can be read reasonably and consistently without putting such a construction on it. The section dealt with two classes of holdings where demesne came in: 1, a holding consisting substantially of demesne, which was excluded altogether under sub-sect. 1 (b) of clause 5; 2, it dealt

with the case where a distinct and substantive part of the property was demesne, and the Court considered that part was not the substantial part of this property, and that was to be dealt with in the way pointed out in sub-sect. 2. That is the clear meaning of the Act of Parliament. Where the substantial part of the holding is demesne, it is entirely out of the Act; but if a distinct and substantive part is demesne, then it has to be considered under sub-sect. 2; and that is the view which was accepted by the Sub-Commission Court and it was also the view adopted by the Land Commission.

As I gather from the able and full judgment of Meredith, J., there was a difference between the Sub-Commission and the Land Commission in this respect. The Sub-Commission held that though there was a distinct and substantive part of the demised land demesne, they did not think that that precluded them from fixing a fair rent, and that the separation would not, apart from the fixing of a fair rent, diminish the value of the landlord's interest, and accordingly they apportioned the rent between the two parts, and fixed a fair rent on the part that was not demesne. The Head Commission arrived at the conclusion—adopting the view that a distinct and substantive part of the property was demesne land—that the separation of the property into two parts would diminish the value of the landlord's interest in the property. They had every help from argument and evidence. The MacDermot and Mr. Healy represented Mr. Norton, Miss MacDonnell was represented by Mr. Matheson and Mr. Oulton, and the head landlords, the Misses Barnewall, who had obtained leave to intervene, were also represented by counsel. In my opinion the head landlord having intervened, the cautious and considered words of Meredith, J., commend themselves to my judgment that he was entitled not to ignore the head landlord. The Land Commission having allowed him to intervene, he was heard. "Including" the head landlord is the word the learned judge uses all through, and that he could not "ignore" him. That being the position of the landlord and the parties, a great mass of evidence was submitted to the Land Commission. They had the evidence of Mr. Barnes, Mr. Barrington, and Mr. North, and the result of all the evidence the Land Commission found in their judgment is that the separation of the property into two parts,

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demesne and non-demesne, apart from the fixing of a fair rent, would diminish the value of the landlord's interest therein, and that was the real question for determination.

We have heard the case ably presented and ably discussed, having regard to the interest of the parties. But to my mind the result is plain, the decision of the Land Commission is correct, and the effect of that decision is announced at the end of the judgment of Meredith, J., in the following way—"In the result, however, the evidence has satisfied us that the separation of the property into two parts would diminish the value of the landlord's interest in two ways, one holding, the larger, would be left without any offices at all, which could not fail to be injurious to it, if worked as a tillage farm, and must to an appreciable extent, at all events, diminish its value as a grazing farm. The remaining portion would be overweighted with buildings far in excess of its requirements or possible development. For these reasons, we have arrived at the conclusion that the case does not come within the second sub-section of sect. 5; and we must therefore reverse the decision of the sub-commissioners, and dismiss the originating notice."

In my opinion that decision of the Land Commission is right and should be affirmed, and the appeal dismissed with costs.

FITZGIBBON, L. J.:—

I concur with the Lord Chancellor. Other cases, and other questions, may arise upon sect. 5 of the Act of 1896, and I therefore desire to state the grounds of my decision in the present case clearly.

The main point argued by Mr. Healy was that, even assuming that the separation of the property into two parts would diminish the value of the landlord's interest therein, the Land Commission had jurisdiction to fix a fair rent. He pointed out that the Act of 1881, sect. 58, which excluded "demesne land" from the Land Acts, had been repealed, and he contended that the effect of that repeal was to substitute section 5 of the Act of 1896 for all other and previous legislation on the subject. I assume that he is right in this, although the repeal may have effects, and may raise

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questions, which were not contemplated, and which we ought not to pre-judge.

Assuming the whole statute law as to "demesne" to be found in this perplexing section 5, the question at once arises—What does "demesne land" mean in sub-sect. (2)? Has it the old loose meaning, or is it to bear the restricted meaning of "demesne" answering all the conditions specified in the preceding sub-sect. (1.)? I assume, in favour of the tenant's argument, that, owing to the repeal of sect. 58 of 1881, no land can now be excluded as "demesne," unless it is shown to answer the description, and to satisfy the conditions, in sub-sect. (1) (b) of 1896. But I do not decide that this is the necessary effect of the new Act, because difficulties suggest themselves which we ought not to decide unnecessarily, in the absence of parties who may be vitally affected.

Assuming that the land which may be excluded from sub-sect. (2) must be "land, which when first demised was demesne, and which the provisions of the contract of tenancy, or the circumstances of the case show was intended to be preserved as demesne, or resumed as demesne by the landlord," we have to see whether the 70 acres, portion of Norton's holding, answers that description. In my opinion it does; when first demised by the owners in fee, it was demesne, and it was demised expressly as such.

But the clause is cumulative, and even though it was demesne when first demised, the provisions of the contract of tenancy or the circumstances of the case must further show that it was intended to be preserved, or resumed, as demesne by the landlord. It appears to me that the provisions of the contract of tenancy in this case—whether we take the tenancy between Norton and M'Donnell, or the tenancy between the Barnewalls and M'Donnell—clearly show that the holding was intended to be preserved as demesne. There are restrictive provisions as to the user of the land, and there are covenants for keeping up the mansion-house and demesne, in terms which show that, when the Barnewalls let to Norton, they intended to preserve the demesne character of the holding, and to reserve at least an option of resuming it. I think that the contract between M'Donnell and Norton was intended—as indeed the middleman

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was bound—to preserve the effect of the head landlord's contract. I must admit that it negatives any intention on the middleman's part to preserve the holding as demesne of his own, or to resume possession himself, because the sub-lease is practically an assignment of the entire of his term. But I cannot follow the argument that it is enough to get demesne land out of this exclusion, if a tenant who holds it expressly as demesne from a landlord who has preserved it as such, and intends to resume it, has parted with his interest in the way in which that was done here.

A question arises upon the words "when *first* demised," which I must reserve until a case like *Magner* v. *Hawkes* (1) turns up again. When land first demised—say for 1000 years—as ordinary land, has been made into, and demised as, demesne by the tenant, with the intention of resuming it as such, has the repeal of section 58 of 1881, with the enactment of section 5 of 1896, made it impossible to escape from a statutory tenancy?

Assuming that this case is brought within sub-section (2), will the separation of the property into two parts "diminish the value of the landlord's interest therein?" Whatever be the duration of the tenancy, the evidence is overwhelming that, if this place be cut up into two parts, it will cease to be a large tract of land, with buildings appropriate to a fine farm upon it, and one portion will be left without any buildings, while the buildings upon the other portion will become unsuitable for a farm of 70 acres, though they are suitable for the whole of the undivided holding. This operation involves diminution of value, apart from any consideration of rent or tenure. There is some weak evidence that the agricultural part would let better without any buildings on it, but it is plain that an excessive rent is put by the tenant's valuers on the smaller portion with the buildings upon it, and the value of the landlord's interest in this part must be diminished, because the rent is less secure, and is, in fact, secured chiefly by the personal credit of the individual tenant, Mr. Norton. The Act makes the value of the landlord's *interest in the property*, and not the personal security of the tenant, the test of the jurisdiction to separate the holding.

I wish to say that I give the widest construction in favour of

(1) 32 L. R. Ir. 285.

the tenant to the words "apart from the fixing of the fair rent." I think that they mean "apart from the fixing of the fair rent with all its consequences," including the creation of a statutory tenancy. But where the value of the landlord's interest *in the property* would be diminished, as it would be here, apart from rent or tenure, this sub-section 2 is an affirmative enactment that the jurisdiction to separate the holding does not exist.

WALKER, L. J.:—

I concur. I do not entertain any doubt as to the construction of the section. What was the law on the subject of demesne at the time of the passing of the Act of 1896? There was the rule which follows from *Magner* v. *Hawkes* (1) that an intention to resume possession by the landlord was not necessary to constitute demesne. That state of the law has been modified by the first branch of section 5. But it was also the law since the decision of *Leonard* v. *St. Leger Barry* (2) that if any substantive portion of the holding was demesne, the entire of the holding was excluded from the Land Acts. As I read sub-section 2 of section 5 it is intended to modify that, by enabling a fair rent to be fixed on the agricultural portion, provided that can be done without diminishing the value of the landlord's interest in the property. Mr. Healy has contended that if the tenant is not excluded from the Act by section 5, sub-section b (ii), he is for all purposes within it so far as demesne is concerned, and that sub-section 2 is in ease of the landlord.

I do not express any opinion as to the meaning of sub-section (b) ii. Difficulties will probably arise as to its interpretation, which it will be time enough to deal with when they come before us for decision. I think the drafting was not happy in the repeal of the whole of section 58 of the Act of 1881, so far as demesne land was concerned. Mr. Healy's argument would give sub-section 2 of section 5 no operation at all, but we are bound, if possible, to give some effect to it. He contended that if the case was got out of sub-section 1 it is then within the Act.

(1) 32 L. R. Ir. 285. (2) MacDev. 240.

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The whole sub-section is pointed to the case of a tenant applying to fix a fair rent, and the landlord resisting the application. It deals with a case like *Leonard* v. *St. Leger Barry* (1); the words of the sub-section are—"The Court may, if they are of opinion that, apart from the fixing of a fair rent, the separation of the property into two parts will not diminish the value of the landlord's interest therein, direct that that part shall . . . be treated as a separate holding." The *onus* is there thrown on the tenant, and not on the landlord—"And the Court may fix a fair rent for the remainder of the property held under the demise." Then the last two lines of the sub-section are important—"And the said Acts shall apply to that remainder, as if it were a separate holding." These are the same words that are used in the first part of sub-section 1, except that in sub-section 1 they are negative, and in sub-section 2 they are affirmative. The Acts are only made applicable when the conditions arise.

Under those circumstances I think it is impossible not to see that it is a section in ease of the tenant in its very terms, and the *onus* lies on the tenant to show that the division into two parts will not diminish the value of the landlord's interest in the property. On the facts it has, in my opinion, been proved affirmatively by the tenant's evidence that there would be a diminution of the value of the landlord's interest by the separation. I concur that the appeal should be dismissed.

HOLMES, L. J. :—

The Irish Land Law Code, as I read it, does not give a tenant the right to have a fair rent fixed for his holding, in so far as it consists of demesne land. If it consists wholly or substantially of demesne as described in sect. 5 of the Act of 1896, a fair rent cannot be fixed for either the whole or any part of it. If it consists in part of demesne, but such part is not the substantial part of it, the tenant may have a fair rent fixed for the portion that is not demesne, provided the Court is of opinion that apart from the fixing of a fair rent the separation of the property into two parts will not diminish the value of the landlord's interest therein.

(1) Mac Dev. 240.

This is the only possible construction of the 5th section; and this being so, the tenant is only entitled to have a fair rent fixed for the entire holding, if it does not include any demesne land. It is clear that 70 acres of it formed the demesne that surrounded the mansion house of a nobleman; but it is contended that the owners have long since deprived it of this character by the mode in which they have dealt with it. The contrary appears from the documents. Whether we take the lease of 1858 from Lord Trimlestown to Fagan, or the sublease of 1873 from M'Donnell to the present tenant, it is apparent that it was not only demised as a demesne; but that the greatest care was taken to preserve it as a demesne. No doubt M'Donnell did not contemplate that he should resume it as a demesne for his own use; but it is immaterial what his object was, if he showed, as he has done, that the character of a demesne was to be preserved.

Under these circumstances the sole question arising in the present appeal is whether the division of the holding into two portions, one consisting of what is undoubtedly demesne, and the other consisting of the remainder, will diminish the value of the landlord's interest in the entire. The case is a little complicated by the circumstance that there is both a head and intermediate landlord, and that the latter's term will terminate simultaneously with the term under which his tenant (the applicant) holds. This has led to a discussion as to whether the interest to be regarded is that of the head landlord, or of the immediate landlord, or of both. In dealing with such complicated legislation as the Irish Land Acts, it is not desirable to express an opinion upon their construction beyond what is required for the decision of the case; and it seems to me that for present purposes the question raised is purely speculative, as I am satisfied that whatever diminishes the value of the one reversion, must also diminish the value of the other, although probably in a different degree. I concur in all that Meredith, J., has said on this branch of the case. The injury arising from the division is that instead of a single farm with a residence and farm buildings suitable to its extent, there will be two holdings, one practically without any buildings, the other with buildings far beyond its needs, and therefore burden-

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some. Apart from apportioning or fixing the rent, these two holdings are less valuable than the one, and every interest in the property is affected thereby. It is argued that the only interest of the immediate landlord is to have his rent secured to him during the residue of his term, and that this is done by the personal covenant of a solvent tenant; but Mr. Justice Meredith has pointed out that no one is above the vicissitudes of fortune. The landlord may wish to sell his reversion; and what a purchaser would look to is whether the rents are secured by the lands on which they are charged. I have little doubt that M'Donnell's property would fetch a better price if it were a reversion expectant on a single lease than if it were divided. If this does not amount to a diminution of the landlord's interest, I am unable to conjecture what would.

Solicitors for Norton: *D. & T. Fitzgerald.*
Solicitors for M'Donnell: *Hayes & Sons.*
Solicitors for the head landlord: *Stanuell & Son.*

R. D. M.

RIVERSDALE, LANDLORD; GETHINS, TENANT (1).

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July 3. Oct. 25.

Appeal. Dec. 7, 12.

Land Law (Ireland) Act, 1896, *sect.* 5, *sub-sect.* 3—*Joint tenants or tenants in common—Unity of possession.*

The words "joint tenants or tenants in common" in the Land Law (Ireland) Act, 1896, sect. 5, sub-sect. 3, must receive a strictly legal construction, and consequently, where a holding has been subdivided between a number of tenants who have not, and never have had, any privity of estate, title, possession, occupation, or interest, the Court has no jurisdiction to fix a fair rent upon the respective portions of the holding separately occupied by them.

BY lease, dated 4th March, 1857, Lord Riversdale demised part of the lands of West Bridgeland and Knockadroleen, containing 16A. 2R. 31P., situated in the county Cork, to Thomas Godson and John Godson for the term of forty-one years, from the 1st November, 1856, subject to the yearly rent of £18 7*s.* 6*d.* Thomas Godson died on the 23rd November, 1868. By lease dated 23rd November, 1868, John Godson, the surviving lessee, demised to John Murphy portion of the lands demised by the original lease of the 4th March, 1857, containing 12A. 0R. 39P. for a term of ten years from the 29th September, 1868, at the yearly rent of £27 11*s.* Before this term expired, John Godson, by indenture dated 15th August, 1874, in consideration of the sum of £150, assigned all his interest in the aforesaid 12A. 0R. 39P. to the tenant John Murphy, subject, however, to the payment by him of the entire yearly rent reserved by the original lease, and to the condition that the remaining portion of the lands comprised in the original lease consisting of 4A. 1R. 32P., and retained by John Godson, was for the residue of the term to be indemnified against all rent and taxes. In 1878 John Godson sold his interest in about 3A. 3R. 22P. being a further portion of the lands comprised in the original lease to Denis Murphy, to be held by him free of all rent and taxes for the residue then unexpired of the term granted

(1) Before MEREDITH, J., and the Hon. GERALD FITZGERALD, Q.C., Commr.

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by the original lease. Subsequently Denis Murphy sold his interest to Henry Gethins, who was the tenant in the present case applying to have a fair rent fixed. John Murphy died in 1879, and his son Daniel Murphy went into occupation of his portion of the holding. John Godson remained in occupation of the small portion, that he still retained in his possession, of the original holding up to the time of his death, which occurred in 1893, when it passed into the possession of Edward Godson. On the expiration of the term reserved by the original lease the landlord demanded possession. Edward Godson was apparently willing to surrender, but Daniel Murphy and Henry Gethins refused. Thereupon the landlord brought a civil bill ejectment on title against them for the recovery of the lands, which, however, was dismissed by the Recorder of Cork at the Sessions held in January, 1898, for the East Riding of the county of Cork. On the 28th March, 1898, Henry Gethins served an originating notice on the landlord to have a fair rent fixed, and on the 5th April, 1898, the landlord served a notice to quit on Henry Gethins, Daniel Murphy, and Edward Godson.

The landlord now applied to the Court that the notice of the tenant, Henry Gethins, to have a fair rent fixed be dismissed on the ground that he had not the legal status of tenant as required by the Land Acts.

Wakely, for the landlord:—

To enable the tenant to have a fair rent fixed, his case must fall within the Land Law (Ir.) Act, 1896, sect. 5, sub-sect. 3. Where a holding has been divided among several tenants, as in the present case, a separation of the portions of the holding occupied by them cannot be effected for the purpose of fixing a fair rent, unless they are joint tenants, or tenants in common. These terms must receive a strictly legal construction, as there is nothing in the section or the Act itself to show that they are to have a wider application. In the case before the Court the occupiers have not unity of possession, which is an essential requirement to establish a joint tenancy or a tenancy in common. Consequently the tenant's notice to have a fair rent fixed must necessarily fail.

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T. M. Healy, for the tenant:—

The words "joint tenant or tenant in common" in the section should be construed in a popular, and not a strictly legal sense. It was clearly the intention of the legislation to admit all tenants among whom a holding has been divided to the benefits of the section, provided only they separately worked the respective portions of the holding in their occupation.

Oct. 25.

MEREDITH, J.:—

This case came before us on notice of motion served by the landlord to dismiss the tenant's originating notice upon the grounds that the tenant Henry Gethins "is not tenant of a holding" or a tenant "entitled to have a fair rent fixed under any of the Land Law (Ireland) Acts." The originating notice served on the 28th March, 1898, describes the holding as containing 2A. 1R. 19P. statute measure, but does not state the rent or specify the Poor Law Valuation. As a matter of fact the tenant before the Court has never paid any rent in respect of the parcel of land comprised in the originating notice. The material facts in the case are not really in dispute. They are as follow:—

By lease dated the 4th March, 1857, Lord Riversdale demised to Thomas Godson and John Godson part of the lands of West Bridgeland and Knockadroleen, containing 16A. 2R. 31P. statute, to hold to the said Thomas Godson and John Godson, their executors, administrators, and assigns for the term of forty-one years, from the 1st November, 1856, subject to the yearly rent of £18 7*s.* 6*d.* This lease, it will be observed, expired on the 1st November, 1897. Thomas Godson appears to have died prior to the 23rd November, 1868, for on that date John Godson alone demised to John Murphy the greater part of the holding, viz. 12A. 0R. 39P. Subsequently, by indenture dated the 15th August, 1874, made between the above-mentioned John Godson of the one part and the above-mentioned John Murphy of the other part, after reciting the original lease of 1857 and the lease of 23rd November, 1868, and that "the said John Godson had determined to sell the said twelve acres and thirty-nine perches, subject to the payment of the entire yearly rent of £18 7*s.* 6*d.* reserved by the original lease, and that same were put

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up for sale by auction on the 14th July, 1874, and were purchased by the said John Murphy at the price of £150," it was by said indenture witnessed that "the said John Godson, in consideration of £150, assigned to the said John Murphy, his executors, administrators, and assigns that part of the said lands then in the possession of the said John Murphy, containing 12A. and 39P., being part of the 16A. 2R. 31P. comprised in the original lease, to hold for the unexpired residue of the term granted by the original lease and for all other the estate and interest of the said John Godson, subject to the payment of the entire of the said reserved yearly rent of £18 7*s.* 6*d.*" It is then further provided that the remaining portion of the said lands retained by said John Godson, containing 4A. 1R. 32P. was for the residue of said term to be free and indemnified against all rent and taxes.

Even the remnant of the holding so retained by John Godson seems to have been too much for him, for in the year 1878 he sold portion of the 4A. 1R. 32P. to Denis Murphy, and assigned same to Denis Murphy, free from all rent and taxes, for the residue, then unexpired, of the term granted by the lease of 1857.

Denis Murphy sold and assigned his interest to Henry Gethins, the tenant before the Court, and Gethins has since remained in occupation of his portion of the holding, and has never, as the landlord states in his affidavit, paid any rent or taxes therefor. There is a difference of opinion between the landlord and the tenant as regards the acreage of the portion assigned to Denis Murphy and by him assigned to Gethins, the landlord alleging that Denis Murphy bought 3A. 3R. 22P., while Gethins (as already stated) claims only 2A. 1R. 19P., but this discrepancy does not affect the question which has to be decided on the present application.

John Godson, the survivor of the original lessees, continued in occupation of the attenuated remnant of the original holding down to the time of his death in 1893 free from rent, but paying the rates and taxes in respect of the portion of the land in his own occupation, as also in respect of the portion in the occupation of Henry Gethins. He was succeeded by Edward Godson, who was in occupation of the remnant when the lease expired and who has made a short affidavit, which has been filed on behalf of the landlord.

John Murphy, the assignee of the 12A. 0R. 39P., died in 1879, and was succeeded by his son Daniel Murphy, who was in occupation of his portion at the date of the expiration of the lease.

The lease of 1857 having expired, the landlord who represents the interest of Lord Riversdale, the lessor in the lease, demanded possession which was refused by Daniel Murphy and Henry Gethins so far as regards the portions of the holding in their possession. He met with a less hostile answer from Edward Godson who was, and (judging from his affidavit) apparently is, willing to surrender his portion of the holding. The landlord, however, refused to accept a surrender of part, and insisted upon his right to recover possession of the entire holding.

Now it will be observed that at the date of the expiration of the lease of 1857, the entire holding was in the occupation of three persons, viz. Daniel Murphy, Henry Gethins, and Edward Godson, each of whom occupied in severalty his own distinct and substantive part of the holding under the circumstances already mentioned.

In my opinion these three persons constituted a conjunct tenant (to use a phrase adopted by the Lord Chief Baron in *Ireland* v. *Landy* (1)), and the conjunct tenant as such became entitled to the benefits of the 21st section of the Land Act of 1881.

The landlord with some reluctance acquiesced in this view. He brought a civil bill ejectment for recovery of possession of all the lands which was dismissed in January, 1898, by the County Court Judge on the ground (as we were informed during the argument) that the 21st section applied. The landlord served notice of appeal against the dismiss, but subsequently withdrew the appeal, and the dismiss was affirmed by the Judge of Assize.

The landlord then recognized the inevitable, and adopted a different course. On the 5th April, 1898, he served a notice to quit upon the conjunct tenant. I need not pause to consider what would have happened if the conjunct tenant had been united in action as well as in name, and had served notice claiming to have a fair rent fixed in respect of the entire holding. No such notice

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has been served. The conjunct tenant is a house divided against itself, and joint action is apparently out of the question.

In this state of facts Daniel Murphy and Henry Gethins have served separate notices each claiming to have a fair rent fixed in respect of the portion of the holding which he occupies in severalty. We know nothing about the application of Daniel Murphy beyond the fact that it has been served, which fact is stated in the affidavit of Henry Gethins filed to resist the present motion. The landlord has selected the present, I presume, as a test case, and we are called upon to decide whether or not Henry Gethins is in a position to proceed with his originating notice.

It is manifest that prior to the Act of 1896 this originating notice must have been dismissed as of course. There is no such holding in existence as that described in the originating notice. But the Land Act of 1896 has opened many doors to tenants who were previously shut out from the benefits of the Land Law (Ireland) Acts, and Mr. Healy contends that the door of sub-section 3 of section 5 is wide enought to admit his client.

The sub-section runs thus:—[His Lordship read the sub-section].

Mr. Healy contends that the words "joint tenants," and "tenants in common" are used in a popular non-technical sense, and apply to every case in which a number of tenants are in occupation of a holding, having made a division between themselves of the land and the rent; such division not being binding upon the landlord who remains entitled to treat the tenancy, the holding, and the rent as if they were undivided. In short Mr. Healy argues that the sub-section should be construed so as to include every case of lawful sub-division of a holding. He points out that the clause in question is so fenced round with safeguards that no real injustice can be done to the landlord in interpreting it in the most liberal and generous spirit. Well it is true that the sub-section is framed in a way that brings into the clearest relief the serious obligations resting upon those whose duty it is to give effect to it. But the very fact that even when a case comes *prima facie* within the sub-section the legislature has deemed it necessary to define our obligations so minutely indicates, to my mind, the necessity for ascertaining with scrupulous care whether or not any

given case comes within the operation of the clause. By whom is the application to the Court to be made? By "any joint tenant or tenant in common." Under what circumstances? The sub-section is clear. "Where a holding is held by *joint tenants or tenants in common, and such* tenants have worked and occupied separate portions thereof, and the division of the holding was made prior to the passing of the Land Law (Ireland) Act, 1887." Why are the words "joint tenants or tenants in common" employed, emphasized, and reiterated (technical terms having a clearly defined meaning) if, as is contended, the essential element common to joint tenancy and tenancy in common, viz. unity of possession, is of no importance whatever and need never have existed?

It may be urged that there is an inconsistency between the words "where a holding is held by joint tenants or tenants in common," and the subsequent words: "and *the division* of the holding was made prior to the passing of the Land Law (Ireland) Act, 1887." Division no doubt includes legal partition, and legal partition involves holding in severalty. It seems to me, however, that there would be no violation of the letter or spirit of the sub-section in deciding that it is applicable, and in my judgment it is clearly applicable to cases in which a joint tenancy or tenancy in common *has* existed, and the joint tenants or tenants in common have made either a legal and binding or equitable and informal division of the holding, valid and effectual as between themselves, but not binding upon the landlord. Thus far I go with Mr. Healy, but I am unable to follow him in his contention that unity of possession at any time is immaterial, and that a case of sub-division pure and simple comes within the scope and operation of the 3rd sub-section; thus entitling each and every assignee of a subdivided holding to call upon this Court to say whether it is just that he should have a fair rent fixed in respect of the portion which he separately occupies.

I have abstained, and desire to abstain from offering any opinion on the merits of this case, or speculating as to the intention of the framers of the 3rd sub-section, with a view to controlling or extending the construction of the clause. Speculation (in matters of this description at all events) is at best an unprofitable

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task. The Court of Appeal in *Kelly* v. *Rattey* (1) pointed out the dangers of going beyond or behind what the Legislature has said. Lord Justice Fitz Gibbon, at pp. 450, 451, says:—"But we have over and over again been obliged to point out that, in dealing with these statutes we cannot act on the supposed intention of the framers to control or extend their construction. We cannot go beyond or behind what the Legislature has said. These Land Acts have created, and from time to time extended, rights and privileges. One class of tenants after another has been brought within their benefits; and in deciding whether any new claimant is entitled to come in, the only question which we can consider is whether he is, or is to be deemed to be, a tenant within the terms of the Act under which he claims." And the late Lord Justice Barry, at p. 453, says:—"But as has been over and over again pointed out in this Court, especially by my brother Lord Justice Fitz Gibbon, in these Land Act cases, we are not to consider what we may by speculation conclude to be the justice or the policy of the Acts, or the intention of the Legislature. We have no authority to include within their provisions any case that does not come within the expressed intention."

J. MAC M.

Appeal. Dec. 7, 12.

The tenant appealed to the Court of Appeal (Fitz Gibbon, Walker, and Holmes, L.JJ.).

Healy, for the tenant.

Campbell, Q.C., and *Wakely*, for the landlord.

The following cases were cited:—*Orme* v. *Wills* (2); *Murphy* v. *Murphy* (3); *Ireland* v. *Landy* (4); *Cummins* v. *St. Leger* (5); *Grattan* v. *Wall* (6); *Johnson* v. *Wild* (7); *Boyland* v. *Wright* (8); *Torish* v. *Clarke* (*Starr's Case*) (9).

Cur. adv. vult.

(1) 32 L. R. Ir. 445.
(2) 2 L. R. Ir. 125.
(3) 15 Ir. C. L. R. 205.
(4) 22 L. R. Ir. 403.
(5) [1896] 2 Ir. R. 603.
(6) Ir. R. 2 C. L. 485.
(7) 44 Ch. D. 146.
(8) 24 Ir. L. T. R. 14.
(9) 18 L. R. Ir. 289.

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GETHINS, *Tenant.*

Dec. 12.

FITZ GIBBON, L.J.:—

This case raises a question of the meaning and extent of the Land Law Act, 1896, section 5 (3), which, subject to certain restrictions, authorises the Land Commission to fix a fair rent upon a "portion of a holding" which "is held by joint tenants or tenants in common," but is "separately occupied."

By lease of March 4, 1857, Lord Riversdale, the predecessor of the present landlord, demised 16A. 2R. 31P. to Thomas Godson and John Godson, father and son, for forty-one years from November 1, 1856, at a rent of £18 7*s.* 6*d.* The Godsons, *prima facie*, were joint tenants; Thomas Godson, the father, died, and John Godson, the son, became sole tenant. By underlease of November 23, 1868, John Godson let 12A. 0R. 39P. to John Murphy, and by deed of August 15, 1874, in consideration of £150, he assigned to the same John Murphy the same 12A. 0R. 39P. for the residue of the term of the original lease of 1857, subject to the payment of the entire yearly rent of £18 7*s.* 6*d.* reserved by that lease. He retained 4A. 1R. 32P., and the assignment declared that this residue of the leasehold was to be "free and indemnified against all rent and taxes." John Murphy died in 1879, and was succeeded by his son Daniel Murphy, who still occupies the 12A. 0R. 39P, and has hitherto paid the rent for the entire leasehold of 16A. 2R. 31P.

In 1878, John Godson further subdivided the holding by assigning to Denis Murphy about half of the 4A. 1R. 32P. free of rent and taxes; and Denis Murphy afterwards, and before 1887, assigned this portion of the holding to Henry Gethins, the appellant, who has since remained in occupation, and has never paid either rent or taxes. John Godson, the surviving lessee, remained in occupation of the remainder of the 4A. 1R. 32P. until he died in 1893. He was succeeded by Edward Godson, who is still in occupation, but has made an affidavit on behalf of the landlord; he has not joined in any proceeding to fix a fair rent; and he is stated to be willing to surrender his interest to the landlord. The landlord is unwilling to accept a surrender of anything less than the entire holding, and has done nothing to adopt or sanction the subdivision which has taken place, but which he had no power

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to prevent, as there was no clause against assignment in the lease.

The lease expired on November 1, 1897; at that date the holding was in the possession of (1) Daniel Murphy who had the 12 acre lot, and was bound, as between himself and the other occupiers, to pay the entire rent; (2), Edward Godson; and (3), Gethins—each of these two having about 2 acres indemnified against rent by Murphy's 12 acres. As between landlord and tenant, as in *Ireland* v. *Landy* (1), "all the land originally demised was one 'holding,' the lease, up to its expiration, was a subsisting 'contract of tenancy,' the whole rent still issued out of the whole of the land, and every part of the land was still liable to distress for all arrears of the reserved rent: the lease could be evicted only as a single lease, and every part of the holding was *bona fide* in occupation of persons standing in the relation of lessee, and in no other relation, to the landlord."

The landlord brought a civil-bill ejectment on the expiration of the lease, but he was defeated, because the three occupiers made up what the Chief Baron in *Ireland* v. *Landy* (1), quoting Lord Hatherley, in *Liddy* v. *Kennedy* (2), called a "conjunct" tenant.

Upon the dismissal of his ejectment, the landlord on April 5, 1898, served a notice to quit. This he appears entitled to proceed upon, unless a fair rent can be fixed before it is carried into effect. We may assume that the "plurality of persons," or the "*quasi* corporation aggregate," who make up the "conjunct" tenant, could take advantage of the Land Acts, and fix a fair rent for the entire holding. But unless the Act of 1896 has enabled one or more of them to divide the holding of sixteen acres into three, 12A., 2A., and 2A., respectively, no one or two without the concurrence of all three, can defeat the notice to quit, by creating a statutory tenancy in that which has hitherto been the necessary subject-matter of the Act of 1881, section 21—viz. an "entire leasehold," or an "undivided lease"—and Godson has not resisted the notice to quit. It looks as if he prefers the chance of a "future tenancy" in the 16 acres to whatever his being included in the "conjunct" present tenant under *Ireland* v. *Landy* (1) might give him in

(1) 22 L. R. Ir. 427. (2) L. R. 5 H. L. 144.

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the 2 acres, and, at all events, he is within his rights in desiring to surrender to the landlord.

Daniel Murphy and Gethins have taken the only course which Godson's *isolation* left open to them. Each of them has served an originating notice to fix a fair rent on the portion of the holding in his own occupation. Murphy has a substantial holding of 12 acres, paying as rent for it the rent of 16 acres, £18 7*s.* 6*d.* Gethins has a plot of only 2 acres, and has never paid any rent. Selecting his weakest adversary for the first attack, the landlord has moved to set aside Gethins' originating notice, on the grounds, (1), that he is not tenant of a holding; and (2), that he is not a tenant entitled to have a fair rent fixed under any of the Land Acts.

The Land Commission might have disposed of Gethins by holding, as indeed the facts appear to show, that "the interests of the landlord in the holding," whether in the 16 acres or in the 2 acres, "would be injuriously affected otherwise than by the mere fixing of a fair rent"; and, if so, the Act of 1896, section 5 (3) forbids the fixing of a fair rent on the 2 acres as a distinct holding. Difficulties in applying the Land Acts at all to a small plot, cut off by subdivision from a larger holding, and indemnified against any rent, have also been suggested, which Gethins must overcome, but which do not apply so forcibly, if at all, to Murphy. These difficulties, and any other arguments affecting Gethins only, we reserve for consideration whenever it may become necessary to deal with them. Meredith, J., in his judgment, describes this as "a test case," and the selection of Gethins for summary rejection, without serving a like notice upon Murphy, ought not, in fair dealing, to give the landlord any advantage against Murphy, by whom Mr. Healy stated that he was instructed, and who has had to provide Gethins with the means of fighting what is more Murphy's battle than his own. Accordingly, we follow Meredith, J., in deciding the main question—Does the Act of 1896, section 5 (3), apply to persons situated as Murphy and Gethins are situated here? They are assignees of the tenant's interest in separate parts of an entire holding. With the other parts of that holding, outside what is in their own occupation, they have not now, and they never have had, any privity of estate, title,

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possession, occupation, or interest of any kind whatever, save so far as their being assignees of part has made them answerable to the landlord, not personally, but through their occupation, for the obligations of the single lease and contract of tenancy which affect the entire holding. In short, they have got parts of a holding by subdivision, and if they are within section 5 (3), every case of subdivision must equally be within it, and if it were intended to apply to them, it might have been, and it ought to have been, expressed in plain terms, applying to all cases of subdivision without exception or qualification.

Is it so expressed? Clearly not. The section is, at the outset, limited to the case "where a holding *is held*," i.e. is held at the date of the originating notice—"by joint tenants or tenants in common." Murphy, Gethins, and Godson are not, and never were, joint tenants or tenants in common, in any sense known to the law, or even to the English language. Mr. Healy contended that Meredith, J., had put upon these words a technical sense, and that we could admit Murphy and Gethins to the benefits of the section by reading them in some wider sense. But there is no sense in which we can read them, which would be wide enough to let in these two men, unless we read the section as applying in every case (to use the words of *Ireland* v. *Landy* (1)) where a holding is held by "a plurality of persons," whether they are joint tenants or tenants in common, *or are not*. That is to exclude or contradict the words, not to extend their sense; but the words are carried through the section—"*such* tenants must have occupied separate portions," and the "application" must be that "of any joint tenant or tenant in common." The argument upon which the appeal was supported really resolved itself into a contention that the section was self-contradictory, because it speaks of a "division of the holding"; and this was said to be inconsistent with any joint tenancy or tenancy in common. But it describes the division that is meant, viz. "where *such* tenants," *i.e.* joint tenants or tenants in common, "have *worked* and occupied separate portions thereof." As the "division" must have taken place before the passing of the Act of 1887, and as the "holding" must still be

(1) 22 L. R. Ir. 427.

held by "joint tenants or tenants in common" at the date of the application, the division meant must be one which is consistent with the continuance of "*such* tenants." Unity of *possession* under a single "contract of tenancy" must coexist with the divided "working" and "occupation" of separate portions of the same "holding." There is known, both to the law and to the ordinary relation of landlord and tenant, ample material upon which the words of the section can operate without throwing them so far open as to deprive them of any definite meaning. Where there has been unity of possession in an entire holding, and, whether from its creation, or by its devolution, that holding has come to be "held by joint tenants or by tenants in common," and "such" tenants have, for the purpose of separate working and occupation, made a "division of the holding" among themselves, any one of them, while still retaining his *status* as a "joint tenant or tenant in common," can apply to the Land Commission under section 5 (3); and if the prescribed conditions can be satisfied, he can have a fair rent fixed for the "portion so separately occupied." But neither Gethins nor Murphy ever had, or now has, this necessary *status* of a "joint tenant or tenant in common," and, accordingly, the decision of the Land Commission dismissing Gethins' notice must be affirmed.

Another point was made which requires an answer—Section 48 (2) enacts that "in the definition of 'holding' in the Act of 1881, 'parcel of land' shall be deemed to include an undivided share of land." It was contended that, if "joint tenant or tenant in common" in section 5 (3) received a strict interpretation, the section would be unnecessary, because the enlargement of the definition in section 48 would admit all such tenants. This is not so; section 48 deals with such cases as *Cummins* v. *St. Leger* (1), where "an undivided share of land" is held by a tenant of a landlord, and the other share of *the same land* is held under some other title, or in some other relation. "Land held in severalty" is contrasted in this section with a physically "undivided share of land." Section 5 (3), on the contrary, deals with cases in which a physical "division of the holding," arising from the tenants having

(1) [1896] 2 I. R. 603.

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"worked and occupied separate portions thereof," has resulted in its being "*so* separately occupied" as to come within that section, though it is all the time "held by joint tenants or tenants in common." The sections do not cover the same ground, and that they do not is shown by observing that the other share of the land of which the undivided share was in litigation in *Cummins* v. *St. Leger* (1) was the actual property of the tenant, and the relation of landlord and tenant did not exist at all in it.

While holding our duty to be clear in interpreting section 5 (3) as we have done, I must confess, for myself, that my mind, in its non-judicial capacity, did not see any sufficient reason for limiting the relief offered by the section to joint tenants and tenants in common, and for leaving out a "conjunct" tenant such as was found in *Ireland* v. *Landy* (2), and I tried to find some way of covering that case; but this could not be done, as I have shown, without admitting any and every "plurality of persons" who might be found in occupation of a leasehold at the expiration of a lease, no matter what amount of subdivision, or even of "squatting," might have taken place during the term, regardless even of whether any rent had been paid by the occupiers in respect of their separate portions or not. But there was the further insurmountable difficulty that, if I assumed the attention of the Legislature to be directed to *Ireland* v. *Landy* (2) in passing section 5 (3), that decision, in every judgment, and in the most distinct and express terms in the judgment of the Lord Chief Baron, showed that the "plurality of persons" who made up the "conjunct" tenant were *not* joint tenants, and were *not* tenants in common; and therefore, if the legislators had *Ireland* v. *Landy* (2) in their minds when they brought in joint tenants and tenants in common, they must have intended to leave out "conjunct" tenants, if they understood or had even read the case at all.

Furthermore, when even the case of joint tenants and tenants in common was fenced round with the strict conditions which the section imposes, it seems incredible that such roundabout and apparently limiting language should have been employed, if it was intended to give an unlimited jurisdiction to the Land Commis-

(1) [1896] 2 Ir. R. 603. (2) 22 L. R. Ir. 427.

sion to separate holdings, and to create statutory tenancies in sub-divided plots, not only at the expiration of leases, but in every case where there had been subdivisions, or separate occupation of any kind, during the continuance of a single "contract of tenancy."

WALKER, L.J.:—

In this case three persons have become by lawful sub-division entitled to separate portions of a holding which contains 16A. 2R. 31P. Murphy holds 12A. 0R. 39P.; Gethins holds 3A. 3R. 32P., or some smaller area—a point not material; and Godson holds the small residue. Murphy is as between him and the others bound to pay the entire rent, and he has continuously paid it, and Gethins has never paid any rent; but of course this arrangement or contract between the tenants does not bind the landlord.

Gethins has applied to fix a fair rent, and he contends that his case falls within sect. 5, sub-sect. 3, of the Act of 1896. It is clear that the three form the conjunct tenant of the holding within the meaning of *Ireland* v. *Landy* (1). They have worked and occupied separate portions, and the division was made prior to the passing of the Land Law (Ireland) Act, 1887. It is clear, however, also, that they are not joint tenants, or tenants in common, according to the legal sense of these technical words, which are as old as our law. The words in their legal sense have complete operation. They embrace the cases of persons having unity of possession, and every word in the section has an apt meaning as applied to persons who are in law joint tenants, or in law tenants in common.

To meet the case of the tenant here, the words should run, "when a holding is held by joint tenants, or tenants in common, or by two or more persons occupying under a lawful sub-division," and a similar alteration should be made in the clause, "on the application of any joint tenant or tenant in common." There might be other variations in the language which would attain the same result. If the language permitted of such a construction, I

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would attach no value to the argument of hardship, because there are ample safeguards provided. For myself, I think Gethins' case would be on other grounds excluded from the section; but it is only fair to Murphy that we should give to the section such legal construction as we consider it bears.

I was at first struck by an argument in favour of the tenant, which occurred to me upon sect. 48, sub-sect. 3; but, upon a careful perusal of that sub-section, I do not think it helps the appellant, and, as questions may arise upon that sub-section, I decline to express any opinion upon it.

There is a settled rule of law in the construction of statutes, that legal and technical words (and this eminently applies to a description of well-known estates) must receive their legal and technical meaning, unless this would involve absurdity, or would cause the words used to fail in operation. No such result will follow here, for joint tenants proper and tenants in common proper are within the scope of the enactment.

There is another case—that of the conjunct tenant—which, perhaps not unreasonably, might have been brought by the framers of the Act within its scope; but whether, by design or not, that case has not been dealt with, and such tenants are still excluded when they do not unite in action.

I think the section has been interpreted by Mr. Justice Meredith in the only way it legally could be, and I concur that the appeal must fail.

HOLMES, L.J.:—

It is admitted that the tenant would not have been entitled to have a fair rent fixed before the passing of the Land Law (Ireland) Act, 1896; and the sole question is whether the right is given him by sect. 5, sub-sect. 3, of that statute.

At a very early stage of the argument there seemed to me to be an unanswerable objection to the tenant's contention. The sub-section in question only applies "where a holding is held by joint tenants or tenants in common," and the persons in whom this tenancy is vested neither are nor have ever been the one or other.

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A lessee, not restrained from alienation, may assign different divided portions of the demised premises to different persons, and the assignees thereupon become the holders of the entire leasehold interest; but they are not joint tenants or tenants in common either of such interest or of the holding. This is the position of Gethins and of the two other persons who were in occupation when the lease terminated. Each of them had been up to that time, and is now, the owner in separate possession of a divided portion of a holding, held by them all as a single tenancy subject to one rent; but the essential feature that characterizes alike a joint tenancy and a tenancy in common—unity of possession—is and has always been wanting. How then can the tenant bring himself within the sub-section? The words "joint tenant" and "tenants in common" are not merely terms of legal art; but they are only used by lawyers or by some one who wishes to employ the language of lawyers. They have no popular, as distinguished from their technical, meaning.

It has been argued that the subsequent reference to "the division of the holding made prior to the passing of the Land Law (Ireland) Act, 1887," shows that the sub-section is not dealing with persons who are joint tenants or tenants in common, in the ordinary sense, inasmuch as a joint tenancy or tenancy in common ceases upon division, and the language used seems to contemplate that notwithstanding division it will continue to exist. If what is meant by division in the sub-section is partition, there would be some force in the argument, although, even in that case, I should be disposed to think that the only way in which the apparent inconsistency could be explained would be by the interpretation suggested by Mr. Justice Meredith; that is, by reading the words as meaning "where a holding is held by joint tenants or tenants in common, and such tenants have made a division before 1887." But there is in truth no necessity for this. What is meant by "division" appears from the preceding portion of the sentence—"and such tenants have *worked and occupied* separate portions thereof, and the division of the holding," that is, the division by such separate working and occupation "was made prior to the passing" of the Act of 1887.

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It often happens that joint tenants or tenants in common work and occupy separately where there is no partition. For this proposition, the case of *Torish* v. *Clarke* (*Starr's Case*) (1), although a registration appeal, is precisely in point. There it was held that persons who are joint tenants in point of law may in point of fact occupy separate portions of the premises.

Counsel for the tenant has appealed to the intention of Parliament, and urges that the effect of the construction adopted by the Court is to unduly limit the class to whom the sub-section was intended to apply. But I have no means of ascertaining the intention of the Legislature, except from the language it uses. The only alternative to our construction is to invent a new sub-section. But this is to make, not to expound, a law. By giving the words their natural—in fact their only possible—meaning, we make them applicable to many cases that have an actual existence; and there is no danger that the provision will fail for want of subject-matter to come within it.

Solicitor for the landlord: *Ross Todd.*
Solicitor for the tenant: *Magnier.*

G. Y. D.

(1) 18 L. R. Ir. 289.

BROPHY, TENANT; BARTER, LANDLORD (1).

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July 11, 14. Oct. 25.

Landlord and tenant—Holding partly agricultural and partly non-agricultural —Subletting of the non-agricultural portion—Tenant in occupation of the agricultural portion—Right to a division of the holding under Land Law (Ireland) Act, 1896, sect. 5, sub-sect. 2.

Where a holding is partly agricultural and partly non-agricultural, it is not necessary for the tenant, whether yearly tenant or leaseholder, who claims the benefit of the Land Law (Ir.) Act, 1896, s. 5, sub-s. 2, to prove that he is in *bona fide* occupation of the entire holding. It is sufficient if he proves that he is in *bona fide* occupation of the agricultural portion in respect of which he claims to have a fair rent fixed, and which is to be treated as a separate holding, provided such agricultural portion constitutes the substantial part of the holding. But where the non-agricultural part is the substantial part of the property (as the Court held to be the case in the present instance), the tenant is *ex vi termini* excluded from the benefit of the section. What is sufficient evidence upon this point considered.

THIS appeal was heard at Cork. The facts of the case and the questions raised appear fully from the judgment of Meredith, J.

Mr. Maurice Healy, solicitor, appeared for the tenant.

Lawrence, for the landlord.

MEREDITH, J.:—

Oct. 25.

The originating notice was served in this case shortly after the passing of the Land Act of 1896, viz. on the 28th of October, 1896. The notice states the particulars of the holding as follows: Area, 180 acres, statute; rent, £75; Poor Law Valuation, £76 12*s.*, and the application is made in the prescribed form to the following effect:—"I, the lessee, being in *bona fide* occupation of the above holding, apply to the Court for an order fixing the fair rent to be hereafter paid for the above holding, which is held under a lease bearing date the 24th of September, 1860, made by

(1) Before MEREDITH, J., and the Hon. GERALD FITZGERALD, Q.C., Commr.

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Thomas Barter to Andrew Brophy for the term of one hundred years, at the yearly rent of £75."

The case in due course came on for hearing before a Sub-Commission Court, and on the 17th of July, 1897, an order was made ascertaining the correct area of the holding at 93A. 2R. 30P., held in severalty, together with the grazing of three-fourths undivided of Carrigleigh Mountain (which appears to contain 108 acres), declaring that the lessee should be deemed a tenant of a present tenancy in the holding, pursuant to the Land Law (Ireland) Act, 1887, and fixing the fair rent of the holding at £62 5*s*. In the Pink Schedule the gross fair rent is estimated at £156 2*s*. The striking contrast between the gross and net figures is accounted for by the fact that the holding embraces a considerable portion of the village of Inchigeela in the Barony of West Muskerry and county of Cork. The Lake Hotel of Inchigeela, the Post Office, and several other more or less valuable buildings stand upon the holding. The particulars of the landlord's and tenant's improvements are stated in the Pink Schedule. The particulars in that schedule show that the Sub-Commission valued the land at £60 18*s*. and the buildings at £95 4*s*. per annum: total, £156 2*s*.

Both landlord and tenant served notice of re-hearing, and the case was heard before Mr. Commissioner FitzGerald and myself at our last sitting in Cork. We have before us a report of our Court Valuers, the material figures in which are these:—Annual value of land, £57 17*s*. 3*d*.; capital value of buildings, £1950.

It will be observed that there is only a difference of about £3 between the valuation placed upon the land by the Sub-Commission and Court Valuers, but that the estimate of the capital value of the buildings made by the Court Valuers differs considerably from that of the Sub-Commissioners, the Court Valuers' estimate being £1950, as against the Sub-Commissioners' estimate of £2380. The Court Valuers quite properly do not attempt to determine or express an opinion as to the relative rights of landlord and tenant as regards the buildings.

We had also before us a map made by order of this Court, after a hearing which unfortunately became abortive owing to the resignation of Sir Edmund Bewley. From that map and a schedule attached to it, the accuracy of which, except in one particular, viz.

the Poor Law Valuation of the hotel, which is £13 10*s.*, not £11, has been proved by the tenant. It appears that in addition to the dwelling-house of the tenant, which is situate in the village, and a house or cottage occupied by Kelleher, a workman in the employment of the tenant (who pays £2 a-year in labour for it), there are twelve sets of houses and premises in the village of Inchigeela sublet by the tenant to various persons. The area of land comprised in these sublettings is small, but the Poor Law Valuation is large. Now the tenant gave us the particulars of the rents he received from his various sublettings. These are the particulars: Hotel, £10; H. Twohy, £3 10*s.*; Cornelius Cahalane, £2; John Ahern, £3; Post Office, £3; Timothy Ahern, £3; John Barry, £2; Jerry Cotter, £3; J. J. Casey, £5 10*s.*; Daniel Reilly, £1 10*s.*; Dispensary, £7 15*s.*; J. Murphy, 1*s.* (Murphy used to pay £10 a-year); J. Kelleher (workman). They amount in all to the respectable total of £44 6*s.*; but that sum does not represent the full letting value of the premises. Take the case of the hotel. Mrs. Nolan (a sister of Mr. Brophy the tenant before the Court) is the subtenant of the hotel premises, for which she pays a rent of £10 per annum. How did the subtenancy originate? In this way:—On the death of Andrew Brophy, who was the lessee in the lease of 1860, his widow and administratrix Mary Brophy determined to set up the interest of her deceased husband for sale in the most advantageous manner. Accordingly the property was divided into two lots, Lot 1 being the interest of the lessee in the lease of 1860, subject to the then existing subtenancies and to a further subtenancy which was to be created by the purchaser of Lot 1 in the hotel premises. Lot 2 consisted of the hotel premises which was sold subject to a rent of £10 per annum, payable to the purchaser of Lot 1, who was bound by the conditions of sale to execute a sub-lease of Lot 2 to the purchaser thereof at a rent of £10 per annum. Mr. Brophy, the tenant before the Court, bought Lot 1, and his sister Mrs. Nolan bought Lot 2 for £400, and paid that sum of £400 to the administratrix of Andrew Brophy. Of course I do not overlook the fact that the licence was sold with the hotel premises, but the fact remains that, subject to £10 a-year, this sub-lease sold for £400. Again, the bakehouse which Murphy now holds at one

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shilling a-year had been in his possession as tenant to the Brophys for many years prior to the lease of 30th September, 1889, by which the present sub-tenancy was created. He paid a rent of £10 in respect of it. In 1889 he fined down the rent to one shilling per annum, paying a sum of £135 to Robert Brophy, in consideration of the lease under which he now holds. Again, the Post Office is held by Mrs. Lehane, as sub-tenant, at £3 per annum. But this is merely a ground rent payable in respect of the site, as Mrs. Lehane built the house herself, and Mr. Brophy, in order to test whether she had (as she alleged) a lease from his father entitling her to occupy at a rent of £3, demanded payment of a rent of £8 per annum, but was defeated owing to the existence of the lease. Further, Michael Twohy pays £3 10*s.* per annum, which is really a ground rent for a site in the village of 20 perches statute. He built the house himself in 1894. Not to multiply instances, I may state that in some of the remaining cases the sub-lessees either built their houses entirely at their own expense or partly out of their own money, and partly with aid from the Brophys.

Now when these facts were opened to us the obvious question presented itself. How can the lessee maintain the order of the Sub-Commission in the face of these numerous and substantial sublettings? I should mention that no question of consent by the landlord to the sublettings was argued or suggested. It seemed familiar learning that a lessee applying under the 1st section of the Act of 1887 must be in *bona fide* occupation of his holding. The landlord had brought the point prominently forward in his grounds of appeal, and his counsel Mr. Lawrence gave equal prominence to it in his argument. The 7th section of the Act of 1896 was exhaustively discussed on both sides. The attention of the Court was fixed upon this question of subletting, and we were certainly under the impression during the first argument that the answer to that question would determine the entire case. It is now plain that our impression was not well founded, and that a much more serious question and one affecting not merely the case before the Court, but of general interest and importance called for decision. We had no difficulty in arriving at the conclusion that the Lake Hotel was not a dwelling-house within the meaning of

the 7th section of the Act of 1896. We had no difficulty in determining that upon the facts and figures before us it was impossible to hold that the tenant was in *bona fide* occupation of a part not less than seven-eighths or thereabouts in value of the entire holding within the meaning of the 7th section of the Act of 1896, and consequently that the landlord was entitled to have the order of the Sub-Commission reversed on the subletting point. Accordingly, without deciding or indeed considering the question whether the holding itself was within the Act either wholly or in part, and basing our opinion upon the status of the tenant, we announced our intention of reversing the order of the Sub-Commission and dismissing the case, when at once Mr. Healy intervened and with perfect propriety pointed out that there had been a misconception as to his argument on behalf of the tenant. We intimated at once that we would make no final order in the case until we had heard the matter further discussed, and by arrangement with Mr. Lawrence the case was re-argued on the following day. Briefly stated, Mr. Healy's contention is this :—The 5th section of the Act of 1896 has made it imperative upon the Court in cases like the present, to decide in the first instance whether the property comprised in the demise consists in whole or in part of a "holding" in respect of which a fair rent may be fixed. A holding may be substantially agricultural or pastoral in its character within the meaning of sub-section (1) of section 5 of the Act of 1896, and yet the tenant may have no right to have a fair rent fixed in respect of it, by reason of the fact that a distinct and substantive part of the property comprised in the demise is demesne land or is not agricultural or pastoral in its character or is an incorporeal hereditament. Why (he argues) should a tenant whose holding is so situated and who desires to avail himself of the provisions of sub-section (2) of section 5 of the Act of 1896 (which enables the Court, under clearly defined conditions, to divide the "property" and to fix a fair rent for the agricultural remainder "as if it were a separate holding") be met and defeated by the preliminary objection that he has not the personal status necessary to entitle him to the right to have a fair rent fixed in respect of the entire undivided property comprised in the demise, which is not and cannot constitute a holding in respect of which a fair rent may be fixed.

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Applying his argument to the facts of the present case, Mr. Healy contends that his client was entitled to come into Court claiming in the first instance the right to have a fair rent fixed in respect of the entire holding, or in the alternative to have the holding divided under section 5, sub-section (2), and a fair rent fixed in respect of the agricultural portion. He claims that he was entitled to argue, for example, that the Lake Hotel if regarded merely as a dwelling-house, was an agricultural adjunct to an agricultural holding, and (if successful in that argument) that the circumstance that it happened to be sublet was immaterial, having regard to the provisions of section 7 of the Act of 1896. But he was entitled to argue in the alternative that if it was not regarded as a "dwelling-house," it must be considered as a hotel separately let and forming a distinct and substantive part—which was not agricultural or pastoral in its character—of the property comprised in the demise of 1860. I think it is only fair to Mr. Healy to state that his alternative argument was not an afterthought, but was in reality involved in his original statement of the case, although owing to a misconception, which I regret, the full force of the argument was lost sight of.

The difficulties of the situation are obvious, because a tenant who desires (if he can) to succeed in fixing a fair rent in respect of the entire holding must necessarily minimize in every possible way the importance of such seeming excrescences upon a substantially agricultural holding as the harmless necessary hotel, post office, and grocer's shop: while, when it comes to the question of dividing the holding, it may be his interest to contend that each and all of these are things essentially non-agricultural in their character.

Again, it might happen, as it has happened in the present case, that under the existing circumstances the tenant could not succeed in fixing a fair rent in respect of the entire holding, for the simple reason that regarding the holding in its entirety the tenant was not in *bona fide* occupation: while if the holding were divided, it might well be that the sublettings would be found to exist wholly or mainly upon the non-agricultural entity, and the tenant would be secure in the *bona fide* occupation of the agricultural portion.

All these difficulties were laid before us by Mr. Lawrence in his brief but able argument on behalf of the landlord. We have

considered them with the utmost care, but we have come to the conclusion that in principle Mr. Healy's argument is correct. I think the decision of the Court of Appeal in *Norton* v. *M'Donnell* (1) and the judgments pronounced by the Lord Chancellor and the Lords Justices in that case demonstrate its correctness. [His Lordship referred to the judgments delivered.] Sub-section 1 of section 5 is *negative* (as Walker, L.J., points out): "The Land Law (Ireland) Acts shall *not* apply to the following tenancies." Sub-section (2) is *affirmative*: "The *said* Acts" (that is, the Acts mentioned in sub-section (1), for they are not previously mentioned in sub-section (2)) "shall apply"—to what?—"to that remainder" (that is, to the agricultural remainder) "as if it were a separate holding."

The Land Law (Ireland) Acts are only made applicable when the conditions of sub-section (2) arise and have been fulfilled. The words "unless the tenancy has expired" show that sub-section (2) applies, and was intended to apply to the case of leaseholds coming within section 21 of the Act of 1881, or the 1st section of the Act of 1887.

I am therefore of opinion, and so decide, that it is not necessary for a tenant, whether yearly tenant or leaseholder who claims the benefit of sub-section (2) of section 5, to prove that he is in *bona fide* occupation of the entire property. It is sufficient if he proves that he is in *bona fide* occupation of the agricultural remainder in respect of which he claims to have a fair rent fixed, and which is to be treated as a separate holding.

It thus becomes necessary for us to consider and decide the question. Has the tenant brought his case within sub-section (2)? Have the conditions of that far-reaching clause been fulfilled? We have no jurisdiction to entertain the tenant's application for a division of the holding unless we consider that the non-agricultural part is not the substantial part of the property. How is it possible for us to do that in the present case? In *Irwin* v. *Scanlan* (2) we separated the village portion of a holding from the purely agricultural part, and we should be prepared to apply the same rule in the present case if the facts and figures permitted.

(1) *ante* 51, 71. (2) Unreported.

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But in *Irwin* v. *Scanlan* (1) the facts and figures demonstrated that the agricultural portion of the holding was beyond all doubt the substantial part of the property; whereas, in the present case the facts and figures demonstrate that the *non*-agricultural portion, the village portion, constitutes the substantial part.

I have already referred to the findings of the Sub-Commissioners and to the report of the Court Valuers. How does the evidence stand? Mr. Albert Barnard, for the tenant, valued the lands comprised in the holding at £41 14*s.* 11*d.*, and arrived at a fair rent of £40 14*s.* 11*d.* by deducting £1 in respect of improvements. He made no valuation of the buildings, but considered that the sites would be worth £1 each. Mr. Michael Martin, for the landlord, valued the land and commonage at £65 11*s.*, including 10*s.* in respect of the proximity to the village of Inchigeela. Mr. Martin's estimate represents the high water-mark of the valuation on land alone. He is about £5 above the Sub-Commission, and £8 above the Court Valuers; while Mr. Barnard supplies the low water-mark, being about £16 below the Court Valuers and £19 below the Sub-Commission. Mr. Martin estimated the capital value of the buildings at £1565. Then we have the tenant's evidence as to the rents he receives from his sub-tenants, and the circumstances connected with the various lettings. Thus, in any aspect of the case, the village portion of the property preponderates in value. I cannot accede to the suggestion that the Lake Hotel is the only distinct and substantive part of the property which is not agricultural or pastoral in its character. If the hotel is not agricultural in its character, neither is the post office; if the post office be included in the non-agricultural category, how are we to deal with Murphy's bake-house and Casey's grocer's shop? We have no doubt that these form part of the non-agricultural portion of the property. Can we make a distinction between these and the other houses in the village? It seems to us that we cannot do so. Dwelling-houses in a village street, in which a few small wares are offered for sale, do not cease to be dwelling-houses because of the endeavour of the occupier to combine residence with commerce on a limited or infinitesimal scale.

(1) Unreported.

But when the Court is called upon to resolve a holding like the present into its agricultural and non-agricultural elements, it appears clear that such dwelling-houses must be dealt with as appertaining to the non-agricultural element.

Having regard, then, to all the facts and figures proved in evidence before us, and to our Court Valuers' report, to which we attach considerable weight, we hold as jurors that, even if the tenant's residence and dispensary are allocated to the agricultural portion, the non-agricultural part of the property still remains the predominant partner, and outweighs in value the remainder of the holding. Having reached this conclusion of fact, the law is plain. We must decide that the tenant has failed to bring his case within sub-section (2).

Accordingly, we reverse the decision of the Sub-Commission, and dismiss the originating notice with costs.

Solicitor for the landlord: *Ashe.*
Solicitor for the tenant: *M. Healy.*

J. MAC M.

Q. B. Div.
1897.
Dec. 14.

BRADLEY *v.* ARCHIBALD (1).

(1896. No. 1694—Exch.)

Practice—Costs—Detinue—Judgment for recovery of the specific goods, and for damages not exceeding £5—R. S. C. Ir. (1893), *Order LXV., Rules* 3 *and* 4.

The provisions of Order LXV. (1893), Rules 3 and 4, limiting a plaintiff's right to costs where he recovers as damages a sum not exceeding £5 in actions of tort, do not apply to an action of detinue in which the goods are recovered in specie.

Motion on behalf of the defendant to review taxation.

The action was brought for the return of certain promissory notes, or their value; and for damages for their detention. There was also a claim for damages for breach of contract. The case was tried at Londonderry Summer Assizes, 1897, before Mr. Justice Madden and a common jury. The certificate of the registrar stated that the following questions were submitted to the jury:—1. "Did the defendant agree with the plaintiff to discount the notes in question?" [Answer, yes.] 2. "Does the defendant detain the plaintiff's notes?" [Answer, yes.] 3. "If you find for the plaintiff, assess damages." [Answer, £4.] The certificate continued:—"The jury accordingly found for the plaintiff with £4 damages; and the promissory notes having been handed over to the plaintiff by the defendant in open Court, the Judge gave judgment for the plaintiff, with £4 damages, with legal costs."

The judgment as entered up did not state that the re-delivery was upon consent.

On taxation of the plaintiff's costs, the defendant objected that, under R. S. C. (Ir.) Order LXV. (1893), Rule 4, as the parties resided within the same civil bill jurisdiction, the plaintiff was not entitled to any costs. The Taxing-Master overruled this objection, and the defendant now moved to review that ruling.

(1) Before Palles, C.B., and Murphy and Boyd, JJ.

Denis Henry, Q.C., and *Glover*, for the defendant:—

Detinue is "an action for a wrong or injury disconnected with contract" within the provisions of Rules 3 and 4 of Order LXV., which follow sect. 243 of the C. L. P. Act, 1853, and sect. 97 of the C. L. P. Act, 1856. Less than £5 having been recovered, and the parties residing within the same civil bill jurisdiction, the plaintiff is not entitled to any costs, not having obtained the necessary certificate from the Judge at the trial:—*Bryant* v. *Herbert* (1); *Byrne* v. *M'Evoy* (2); *Birmingham* v. *Billing* (3). [They also cited *O'Sullivan* v. *Dublin and Wicklow Ry. Co.* (4).]

Wylie, Q.C., and *Horner*, for the plaintiff:—

These provisions only apply to cases of tort, in which the relief claimed is damages, not to an action of detinue, the substantial object of which is the recovery of the specific article: see *Danby* v. *Lamb* (5), a decision under sect. 34 of the English C. L. P. Act, 1860. In those cases of detinue where these Rules have been held to apply, the Court so decided expressly upon the circumstance that the gist of the particular action was damages solely. In *Bryant* v. *Herbert* (1), the Judge at the trial had refused to make an order for delivery of the article.

PALLES, C.B.:—

We are all of opinion that the Taxing Master was right in this case. The words of the Rules that correspond to section 243 of the Common Law Procedure Act of 1853, and section 97 of the Common Law Procedure Act of 1856, are very peculiar. They say that where the plaintiff shall recover a sum less than £20 in contract, or a sum not exceeding £5 in tort, he shall, under certain circumstances, be deprived of costs, or be entitled to half costs only. Thus the subject matter of these Rules, and of the sections of the Acts of 1853 and 1856, plainly is a judgment that deals with a sum of money, and a sum of money only. In my opinion, these

(1) 3 C. P. D. 189.
(2) Ir. R. 5 C. L. 568.
(3) Ir. R. 9 C. L. 287.
(4) Ir. R. 2 C. L. 124.
(5) 11 C. B. (N. S.) 423, 31 L. J. (C. P.) 17.

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Palles, C.B.

provisions have no application to a case in which the proper relief would be relief by way of injunction. The question came, some little time ago, before us in the Exchequer, and, on an appeal being taken, the Court of Appeal agreed that if the case was one in which an injunction could be granted, these provisions would not apply.

Now, what is it that the plaintiff has recovered in the present action? It appears that, late in the course of the proceedings at the trial—it does not appear exactly when—the notes, for the recovery of which the plaintiff was suing, having been handed over, judgment was given for the sum of £4 for damages, but there was no assessment by the jury of the value of the notes. In my opinion that was a proceeding by consent; at least it was one which, by the consent of the defendant, stopped the ordinary course of procedure—just as much as if, where a plaintiff sued for the detinue of a deed, the defendant offered to hand over the deed, and brought into Court a sum of money in respect of the damages claimed. In my opinion the plaintiff has substantially recovered these notes in this action; that is, the defendant has, by reason of the action, handed them over to the plaintiff, instead of their being obtained by judgment in detinue in the first instance, and then by a specific order for their delivery. I think that we must judge the question of costs as if the case had progressed to its ultimate proper conclusion, resulting in such an order of the Court as the plaintiff would in that event have been entitled to. But what he would then have obtained, he obtained in this case from the voluntary act of the defendant which rendered unnecessary any order of the Court in regard to the documents. I therefore treat the matter as if there had been a judgment in the case that he do recover these notes, or a nominal sum for their value—for, there not being any finding as to their value, I have some difficulty in taking into consideration what the amount should be. I take it accordingly as if Mr. Wylie's position was that judgment was given that the plaintiff do recover these promissory notes, or one shilling for their value, together with £4 damages for their detention.

Upon that state of facts, the plaintiff would have been entitled to apply to the Judge, under the Common Law Procedure Act of 1856, for an order for the specific delivery of the notes to the

plaintiff; and I must take it that what was done was in lieu of an order by the Judge made upon such an application. Well, if such an application as that had been made, I am clearly of opinion that these Rules would have no bearing upon the case. I agree in the view of detinue taken in *Danby* v. *Lamb* (1); and the present case is distinguished from *Bryant* v. *Herbert* (2) by the fact that, in the latter the Judge declined to make an order for specific delivery of the goods, and therefore what was recovered was a judgment for a money demand merely; for it was settled, before the Act of 1856, that, although the form of the judgment was for the re-delivery of the articles or their value, the defendant had the option of paying, and, by paying the amount, of keeping the articles. In reference to *Birmingham* v. *Billing* (3), it is plain that Keogh, J., decided that case upon the ground that the money demand was the real question in dispute between the parties. In the present case, however, we must treat it as if the goods had been actually recovered in specie.

MURPHY and BOYD, JJ., concurred (4).

Solicitor for the defendant: *J. H. Tomb.*
Solicitor for the plaintiff: *S. Brown.*

A. E. R. J.

(1) 11 C. B. (N. S.) 423; 31 L. J. (C. P.) 17. (2) 3 C. P. D. 189, 389.
(3) I. R. 9 C. L. 287.

(4) In *Donnelly v. Donnelly* (1896, No. 2899—Q. B. D., 3 Nov., 1898), before Murphy, Johnson, Boyd, and Kenny, JJ., the plaintiff, who had obtained judgment in an action of detinue of title deeds for re-delivery of same, and nominal damages, moved to review the Taxing Master's ruling, allowing only half costs of suit, under Order LXV., Rule 3.

Ignatius O'Brien, for the plaintiff.

Leech, for the defendant.

THE COURT, following *Bradley* v. *Archibald*, held that full costs should have been allowed, and remitted the case to the Master, with their opinion to that effect.—[REP.]

Appeal.
1898.

Re CAMPION, a Bankrupt (1).

Oct. 27. *Bankruptcy—Arrangement—Failure to pay instalments—Proof by secured creditor who abandoned his security—Right of secured creditor, on failure of arrangement, to set up his security.*

On the 9th April, 1897, C. filed a petition for arrangement, and on the 25th May, 1897, carried his second sitting, his offer being 20*s.* in the £1, payable in six instalments. He paid the first instalment of the composition, but failed to pay the second, and was adjudicated bankrupt upon a declaration of insolvency. The D. Co. had sold to C. certain goods which had not been delivered, as C. had not paid for them, but the goods remained in a warehouse, and the D. Co. had a vendor's lien on them.

On the 26th April, 1897, the D. Co. filed a proof in the arrangement for the full price of the goods, and stated that they held no security. After C. had been adjudicated, the D. Co. filed a proof of debt in the bankruptcy, in which they valued their security at £60 12*s.* 5*d.*, and claimed to prove for the balance of their debt. On motion by the assignees for delivery of the goods:—

Held (reversing the decision of Boyd, J.), that upon the failure by the debtor to pay the composition notes, the D. Co. were remitted to their original rights, giving credit for anything which they received, and that they were entitled to rely on their lien.

Appeal from the order of Boyd, J., dated the 26th July, 1898, whereby it was ordered that the Distillers' Company should deliver up to the assignees three hogsheads and three quarter-casks of whiskey as the same formed part of the estate of the bankrupt.

On the 9th April, 1897, Cornelius Campion filed a petition for arrangement in the Court of Bankruptcy, and on the 10th May carried his first private sitting. On the 25th May, 1897, carried his second sitting; his offer being for 20*s.* in the £1, payable in six instalments at 3, 6, 9, 12, 15, and 18 months.

On the 28th August, 1897, the first instalment of the composition became due, and the debtor paid it, but failed to pay the second instalment. On the 21st October, 1897, Cornelius Campion

(1) Before FitzGibbon, Walker, and Holmes, L.JJ.

was adjudicated bankrupt, the act of bankruptcy being a declaration of insolvency.

On the 21st November, 1896, and 5th August, 1893, the Distillers' Company sold to Campion three hogsheads and three quarter-casks of whiskey, and the same were invoiced to him on the 23rd November, 1896, and 5th August, 1893. The whiskey was never delivered to Campion or to his order, as he had not paid for it, but it remained in the Company's bonded warehouse subject to their lien as unpaid vendors. On the 26th April, 1897, the Company filed a proof of debt in the arrangement for £134 7*s.* 2*d.*, being the price of the whiskey, and stated in their proof that they held no security for the debt. The amount of the debt was subsequently reduced by the sum of £25, being the amount of a bill of exchange from one Hennessy to the debtor held by the Company; and at a sitting for proof of debts held before the Chief Clerk in Bankruptcy dated the 22nd September, 1897, the amount of the Company's proof of debt was reduced to £109 7*s.* 2*d.* A further sum of £30 on foot of their demand was paid to the Company on the 30th October, 1897 (being the amount of a bill of exchange of a third party) leaving a balance due to them of £79 7*s.* 2*d.* On the 19th November, 1897, after the adjudication in bankruptcy, the Distillers' Company filed a proof of debt for the sum of £18 14*s.* 9*d.* for goods sold, and claimed as security for their debt the lien of an unpaid vendor, on the three hogsheads and three quarter-casks of whiskey which they valued at £60 12*s.* 5*d.*

The assignees made an application before Boyd, J., for an order that the Distillers' Company should deliver up the whiskey to them, and on the 26th July, 1898, Boyd, J., made the order. The Distillers' Company appealed.

Serjeant Dodd, and *Herbert Wilson*, in support of the appeal:—

On the failure of the arrangement, the creditor was remitted to his original rights. That is well settled in the case of proof on a bill or note; it also extends to a proof with regard to securities: *Re Tyrie* (1). Once the arrangement fell through, there is nothing to prevent the creditor resorting to his original rights.

(1) 14 L. T. (N. S.) 606.

Appeal. 1898. *Re* CAMPION.

Gordon, Q.C., and *Blood*, for the assignees, referred to *In re Barrington* (1).

FITZ GIBBON, L.J. :—

Two matters have been mentioned in the argument, upon which we desire to express no opinion. First, the contention of the appellants, that if the arrangement had been *carried out*, or was still pending—as distinguished from having been *carried*, and having afterwards broken down—they could have amended their proof by asserting or resuming the lien which the proof negatived. Upon any motion, if made in the arrangement matter, to amend the step they had taken, or to alter the terms on which they stood with the arranging debtor, we express no opinion. The appellants proceeded in and throughout the arrangement matter on the basis that they had no security for all or any part of the debt; and we must decide this case on that state of facts. But the arrangement matter is now over, and the present bankruptcy proceeding is quite distinct from it.

The other matter which we must reserve was suggested by the respondents, viz. :—that "the Fogarty bills" were received in a way which makes them attachable by an independent equity for the benefit of the general body of the creditors. If such an equity exists, it can be asserted; we have nothing to do with it now. Laying both these matters aside, we come to the main question—Whether the assignees in bankruptcy who move to compel the appellants, who are unpaid vendors, to deliver up the specified casks of whiskey, can, or cannot, sustain the application? Unless the assignees can make title *through the bankrupt* to the possession of the whiskey, the motion must be refused.

It is conceded that, on the terms of the original contract of sale, a vendor's lien attached to the whiskey, so long as any part of the price remained unpaid. That being so, the question comes to this :—Was the conduct of the vendors such as to estop them against asserting their lien, or did they absolutely and unconditionally abandon it? The form of the proof certainly does not, to my mind, justly expose the man who verified it to the

(1) 1 L. R. Ir. 130.

charge of making a false statement, or of suppressing a material truth. The words of the proof are—"The particulars of said demand, and any bond, bill, or bills of exchange. or promissory note held for the same, are truly set forth in the schedule hereon endorsed, for which said demand or any part thereof, I say that no manner of *satisfaction or security whatsoever* hath been, to my knowledge or belief, had or received, save as set forth in the said schedule." This seems to me to be pointed to collateral satisfaction or security, and not to the vendor's lien upon undelivered goods for any unpaid balance of the price. But, while saying so much upon the *veracity* of this proof, I assume that, upon its terms, and so far and so long as it was operative, the creditors could not insist upon holding, under a lien for the price, any of the whiskey the price of which was included in the proof. Thus, we reduce the question, in favour of the respondents, to whether the abandonment of the lien was conditional upon the arrangement being carried out.

Holmes, L. J., tested this during the argument by asking—If the proof had mentioned the lien, and had expressly stated that, "for the purposes of the arrangement," it was abandoned, in that case could the present motion be sustained? I think that position was admitted to be untenable. *Tyrie's Case* (1) is both an authority and an instance to show that a creditor can abandon a lien, "not absolutely, but upon a condition of being admitted to prove his debt, and assume his rights as a creditor under a bankruptcy," and yet may reclaim it if "the condition upon which he surrenders his security fails."

The whole of the document containing the appellants' proof imports that it is filed for the purposes of the arrangement only. I cannot see that anyone is prejudiced by holding that its effect is conditional upon the arrangement becoming effective; the real consideration for the creditor's coming forward at all is not the mere "carrying" of the initial stage, but is the "*carrying out*" of the arrangement by payment of the debts as stipulated. There is no evidence of absolute abandonment *in fact*, apart from the terms of the proof, and I think that the proof contemplates abandon-

(1) 14 L. T. (N. S.) 606.

Appeal. 1898. *Re* CAMPION. Fitz Gibbon, L.J.

ment for the purposes of the arrangement only, and conditional upon its being carried out.

There remains the question of estoppel by conduct, as an equitable ground of decision. Such an equity arises where the rights of others would be prejudiced by allowing "a change of front," or where their position has been altered upon the faith of a position once taken up, by any party.

In re Barrington (1) is an instance where a creditor was not "remitted to his original rights," because Miller, J., held that he had "compromised himself by his personal conduct," and that his being so remitted would defeat the object of the resolution which he had supported. But to deprive the creditor of his right to be remitted to his original rights, where the condition has failed on which he waived them, his conduct must be such as would make it, in the equitable sense, "a fraud" upon others, or would give him an inequitable advantage over others, if he were not held to his original position, or were permitted to deny a state of facts which he had once represented to exist, or had once treated as existing.

There is nothing different in kind, or even in degree, in the consequences of now remitting the appellants to their original right of lien upon the whiskey in their hands, from what happens in every case where creditors prove in an arrangement, join in carrying it, receive one or more instalments under it, and are then "remitted to their original rights," because the arrangement has broken down, or the debtor has failed to carry it out.

We are of opinion that that is the position here. The arrangement matter was not "turned into bankruptcy"; the bankruptcy arose independently, and is dealt with in an entirely new proceeding. There was no abandonment of their rights by the Distillery Company, except for the purposes of an arrangement which is now at an end, and they are entitled to retain the whiskey against so much of the price as remains unpaid.

If, after the arrangement broke down, and before the bankruptcy proceeding began, the debtor had demanded delivery of the whiskey, he could not have got it without payment, and his assignees are now in the same position.

(1) 1 L. R. Ir. 130.

The appeal must be allowed, and the motion of the assignees must be refused, with costs here and below.

WALKER, L.J.:—

I concur with Fitz Gibbon, L.J. There was here a lien, good in law, against the assignees for the price of the whiskey. We start with that. In the arrangement matter, and for the purposes of the arrangement, the Distillery Company, in their proof, stated that they had no security, and estimated the amount of their debt on that basis.

The arrangement fell and the proof with it. The creditor was then remitted to his original rights—his claims in respect of the debt due and its nature. He would not be so remitted if he lost the lien for part of it. In reality, the proof means this—for the purposes of the arrangement we make the following proof, on which we shall act if the arrangement is carried out. As a matter of law it is admitted, that when the arrangement failed the creditors were remitted to their original rights, and one of those rights was the vendor's lien.

If the arrangement had gone on, or if it had been turned into bankruptcy, questions would arise on which I express no opinion as to whether the appellants would not be held for all purposes bound by the proof; but this bankruptcy is a new and independent proceeding forced on them. Estoppel there cannot be in the proper sense of the term, nor do I see any representation acted on by which the bankruptcy creditors are affected. If any preferential payment has been received the creditors have a complete remedy in the bankruptcy matter. I think the appeal must be allowed.

HOLMES, L.J.:—

Although the precise question raised by this appeal has probably not been decided before, there is, I think, no difficulty in dealing with it by the application of legal principles with which we have been long familiar. It is admitted that up to the time of the arrangement matter the Dublin Distillers' Company were entitled to a lien for the amount due them by the arranging

Appeal. 1898.

Re CAMPION.

Holmes, L.J.

trader on whiskey sold to him, but still under their control in their bonded stores.

The Company proved in the arrangement for the entire sum due them, and stated in their proof that they held no security therefor. The arrangement proposed by the trader having received the necessary support from his creditors, it became binding, unless or until he showed himself unable to perform it; and there is no doubt that the Company could not have enforced the lien as long as the arrangement was so binding. It is, however, a thing of daily experience that the trader is unable to carry out the arrangement either in whole or in part; and it is well settled that the effect of such failure is to remit each creditor to his original rights; in other words, to place him in the same position in which he would have been if there had been no arrangement. He can sue for the full amount of his debt, giving credit of course for any payment received in part performance of the arrangement; or, if it were already a judgment debt, he can issue execution. Even an instalment order obtained under the Debtors' Act previous to the arrangement becomes operative once more; and a committal order may be made in pursuance thereof: *Newell* v. *Van Praagh* (1).

In the present case the trader did not carry out his proposal, and it would seem to me to follow from the general principle that the lien on the whiskey, which still remained in the bonded stores under the control of the Company, revived.

I asked during the argument if the Company's proof of debt had mentioned the lien, and had stated in terms that for the purpose of the arrangement they were willing to give it up, would not the result, in the events that have happened, have been that they could now rely on it? I understand that this was not denied, but that what is relied on to deprive them of the right which they would otherwise enjoy is the general statement in their proof of debt that they had no lien. It is said that the effect of this is to compromise the Company by their personal conduct, and thereby to prevent them from being remitted to their original rights. I am of opinion that it was absolutely immaterial which form of proof was

(1) L. R. 9 C. P. 96.

adopted, as the construction and effect ought to be precisely the same. No person interested could have been prejudiced or misled. It is argued that by proving for their whole debt the Company obtained a greater voting power; but they were entitled to this additional power when they gave up their lien. Up to the time that the trader failed to carry out his arrangement he had complete control over the whiskey—an advantage to his other creditors as well as to himself; and neither they nor he are in a worse position now that the arrangement matter has fallen through and he has been adjudicated a bankrupt in a separate and independent proceeding.

Solicitors for the appellant: *Larkin & Co.*
Solicitors for the assignees: *Hamilton & Craig.*

R. D. M.

SKEY *v.* SHIELS (1).

Q. B. Div. 1898. Feb. 4. Nov. 5.

Loan Fund Act, 1843 (6 & 7 *Vict. c.* 91, *ss.* 24, 27, 30.)—*Statutory loan by Loan Fund Society—Renewal of outstanding note.*

A renewal being contrary to the provisions of the Loan Fund Act, 1843, a renewal note cannot be sued upon under that Act.

CASE STATED, pursuant to 21 & 22 Vict. c. 43, by the Justices of county Tyrone, sitting at Castlederg Petty Sessions on the 4th December, 1897, on the hearing of a summons brought under 6 & 7 Vict. c. 91, by the present appellant, Skey, as secretary of the Killeter loan fund society, against the respondent, Shiels, and two others (his sureties), to show cause why the respondents neglected to pay the sum of £10 2*s.* 6*d.* upon a promissory note, dated 27th March, 1897 (for £10), and for fines under the rules of

(1) Before O'BRIEN, JOHNSON, and GIBSON, JJ.

Q. B. Div. 1898.

SHEY v. SHIELS.

the society. At the hearing before the Justices, the clerk of the loan fund society was called as a witness for the appellant (complainant), and proved the making of the note. He stated that the note (for £10) was on paper supplied by the Loan Fund Board, and that the loan was given to the respondent, Patrick Shiels, on the 27th March, 1897, the other respondents being his sureties. Witness further stated that, on the day this loan was issued, the respondent, Patrick Shiels, owed £10 to the Killeter loan fund society, previously lent to him on a loan fund note, but that, on the 27th March, 1897, before receiving the loan of £10 now sued for, he paid the previous loan of £10; that this transaction was authorised by the committee who were present at the time; and that the 2*s*. 6*d*. was for fines under the rules of the society. The rules were put in evidence. No witnesses were called for the respondents. Patrick Shiels appeared personally at the Petty Sessions. Service on the others (who did not appear) was proved. The Justices stated that, "upon this evidence, and on seeing and hearing the witness," they found as the fact that the transaction at the loan fund office on the 27th March, 1897, was "really a renewal of the existing note for £10 which had been in existence for some time," and therefore was not a loan within 6 & 7 Vict. c. 91, s. 24; that, this being so, they were of opinion that under section 30 they had no jurisdiction to entertain the case, inasmuch as the failure to pay, dealt with in that section, was not a failure to pay a renewal, but failure to pay the original note; and that they therefore dismissed the case on the ground of "no jurisdiction."

On the application of the complainant, they now submitted to the Court the question (1) whether there was any evidence upon which they might find that the transaction of the 27th March, 1897, at the loan fund office between the appellant and the respondents was "only really a renewal of existing security," and, if so, (2) whether such a renewal constituted a loan within the meaning of section 24 of the statute to which their jurisdiction attached under section 30, or as to what should be done in the premises.

After the Case had been at argument it was remitted to the Justices, in order to enable them to give further details as to the transaction, as proved before them, of the 27th March, 1897. The

Justices, however, stated that they had no further information to give.

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Sullivan, Q.C., and *T. M. Healy*, for the appellant.

Wylie, Q.C., and *Webb*, for the respondent.

The following authorities were cited :—*Enniskillen Loan Fund* v. *Greene* (1); *Doherty* v. *Travers* (2); *Armstrong* v. *Orr* (3); *Cunningham* v. *M'Bride* (4).

Cur. adv. vult.

The judgment of the Court was delivered by—

Nov. 5.

GIBSON, J. :—

In this case a complaint was brought before Justices at Petty Sessions by the secretary of a loan fund society under 6 & 7 Vict. c. 91, upon a promissory note for £10, dated the 27th March, 1897, made by the defendant, Shiel, with two sureties. The evidence is set out in the case submitted for our opinion by the Justices, by whom the case was dismissed upon the ground, first, that the note, upon the evidence before them, as a matter of fact was, in their opinion, a renewal note; and, secondly, that as a matter of law such a renewal note would be contrary to the statute. On the evidence, as stated, it appeared that, upon a previous occasion, Shiel, with sureties, had passed a note for £10. That note was due on the occasion of the present advance on the 27th March, and the case states that on the same day, before receiving the loan, the borrower repaid the previous loan of £10. There are no further facts stated, and the details of the payment do not appear. The Court thought it desirable that the Justices should be asked to supply some further information, and requested the Justices to supplement the case. The Justices, however, stated that they had not any further information to give.

The first question is that of law, whether a renewal note is contrary to the policy of the Legislature in the 6 & 7 Vict. c. 91. That view, which was not questioned by counsel, is in accordance

(1) [1898] 2 Ir. R. 103.
(2) 31 Ir. L. T. R. 67.
(3) 31 Ir. L. T. R. 118.
(4) Unreported.

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SKEY v. SHIELS.

Gibson, J.

with the drift of recent decisions, though the point was not expressly decided, and we are all of opinion that renewals are contrary to the statute. The scheme of the Act contemplates that these small loans should be cleared off altogether before any fresh advance should be made, and that they should not be kept hanging over the borrower's head, which would be quite contrary to the intention of section 27.

If, then, a renewal is not enforceable as contrary to the policy of the Act, is there any evidence that the transaction was a renewal in this case? There is the identity of time, and identity of amount; and we think it would be impossible to say that there was no evidence of renewal before the Justices, who significantly say that they saw and heard the witnesses. I by no means say that they arrived at a right conclusion. It would appear that the defendants were not examined. Yet the Justices, upon the very meagre evidence offered by the complainants and disclosed in the Case, felt at liberty to draw an inference invalidating the note. It is unnecessary to discuss the case at further length. We do not indicate any approval of the action of the magistrates. We merely hold that there was evidence before them upon which they were at liberty to act.

Solicitor for the appellant: *C. F. Falls.*
Solicitor for the respondent: *R. Maguire.*

A. E. R. J.

OWEN M'CABE *v.* GREAT NORTHERN RAILWAY COMPANY OF IRELAND (1).
MICHAEL M'CABE *v.* SAME.

(1898. No. 14,195.)

Q. B. Div. 1898. Nov. 14. *Appeal.* Dec. 15.

Lord Campbell's Act (9 & 10 *Vict. c.* 93)—*Amending Act* (27 & 28 *Vict. c.* 95) —*Two actions commenced in respect of the death of the same deceased person—Staying proceedings—Next-of-kin—Administrator.*

The Court will not, in the absence of bad faith, make an order staying an action under Lord Campbell's Act brought by one of the next-of-kin of the deceased within six months after the death, and before administration is taken out, although administration is subsequently taken out by another of the next-of-kin, and a second action in respect of the death of the same deceased person is instituted by the administrator.

Holleran v. *Bagnell* (4 L. R. Ir. 740), followed.

Motion on behalf of the plaintiff in the second of the above actions, which was one brought by him as administrator of the deceased person under Lord Campbell's Act, that the first action under the same Act in respect of the death of the same deceased person and brought by his brother, as one of the next-of-kin of the deceased, should be stayed or dismissed, or that the two actions should be consolidated.

On the 2nd of August, 1898, an accident occurred on the defendants' line of railway, whereby the mother of the two plaintiffs was severely injured. She died on the 16th of August, 1898, leaving as her next-of-kin in this country two sons, Owen and Michael M'Cabe, the two plaintiffs, and a daughter Rose Ann. She also left a son and daughter, who were in America. Two actions were commenced against the defendants in respect of her death by her two sons Owen and Michael. The action in which Owen was plaintiff was commenced on the 31st of August, 1898, and that in which Michael was plaintiff on the 26th of September, 1898. Previously to commencing his action, viz. on the 13th of

(1) Before Boyd and Kenny, JJ.

Q. B. Div. 1898.

M'CABE v. GT. NORTHN. RAILWAY CO.

September, 1898, Michael had taken out letters of administration to the deceased and he sued as such administrator. He now moved to have Owen M'Cabe's action stayed or dismissed or consolidated with his own. From affidavits filed on behalf of the plaintiff Michael M'Cabe it appeared that an inquest was held on the body of the deceased on the 16th of August, 1898, and Messrs. Corr and O'Connor, solicitors, were instructed by both Michael and Owen to represent the family at that inquest. Mr. Corr, in an affidavit made by him, said that he appeared for them in accordance with those instructions. While at the inquest, he stated, that he was instructed by Michael, with the concurrence and acquiescence of Owen, to take out letters of administration to the deceased, in the name of Michael, with a view to bringing an action under Lord Campbell's Act. He proceeded to take out the letters of administration and obtained the grant, as above stated, on the 13th of September, 1898. In the meantime, on the 1st of September, he received from Mr. Sheridan, solicitor, a letter in which he stated that, acting on behalf of Owen, he had commenced an action in his name, as one of the next-of-kin, under Lord Campbell's Act, and asking him, as acting for Michael, for his opinion on the case generally. Messrs. Corr and O'Connor replied, alleging that he had acted improperly and in bad faith in commencing this action, when he knew they were taking out letters of administration. Mr. Sheridan replied, denying that he had acted improperly or in bad faith, but saying that he would hold his hand until he heard further from them. To that letter Messrs. Corr and O'Connor sent no reply. Owen in his affidavit denied that he ever concurred or acquiesced in the instructions given to Mr. Corr. He stated that his brother was a man of no substance, being merely a farm labourer. The only other next-of-kin in this country, Rose Ann, *was in his interest*, and was anxious that his, Owen's, action should proceed. Mr. Sheridan, in an affidavit made by him, stated that he had been instructed by the deceased, after the accident in her lifetime, to take proceedings on her behalf for her injuries, and that upon her death he was instructed by Owen, as one of the next-of-kin, to institute an action under Lord Campbell's Act. In pursuance of Owen's instructions he instituted an action in Owen's name.

T. L. O'Shaughnessy, Q. C., and *Williamson*, for Michael M'Cabe:—

Owen's action should be stayed. It was commenced in bad faith. He either actively or by standing by acquiesced in Michael's instructions to Messrs. Corr and O'Connor to take out letters of administration. *Holleran* v. *Bagnell* (1) is not an authority against us. There, there was at no time an administrator or personal representative, and therefore it was held that the action was rightly instituted; but here administration was taken out with Owen's knowledge and consent, with a view to bringing an action.

D. S. Henry, Q.C., for Owen M'Cabe:—

The motion is unsustainable. It is made by a person not a party to the record. The Great Northern Railway Company is the proper party to make it. Owen's instructions to Sheridan were regularly given and acted on in good faith. Owen never concurred or acquiesced in Michael's instructions to Messrs. Corr and O'Connor. Michael should have got leave to appear on the hearing of Owen's action by counsel and solicitor to protect his interests: *Johnston* v. *The Great Northern Railway Company* (2). [He also referred to *Holleran* v. *Bagnell* (1).]

R. F. Harrison, for the defendants:—

The defendants have no interest in this motion, except to see that only one action goes on. That is the protection given to us by the statute. We did not move, because we preferred to plead in the second action, relying on *Holleran* v. *Bagnell* (1). [He also referred to *Bulmer* v. *Bulmer* (3).]

BOYD, J.:—

On the authority of *Holleran* v. *Bagnell* (1), and also on the construction of the amending Act of Parliament, we are of opinion that this application must be refused. We think there is nothing to prevent any of the next-of-kin from bringing an action, when there is no executor or administrator in existence,

(1) 4 L. R. Ir. 740. (2) 20 L. R. Ir. 4. (3) 25 Ch. D. 409.

Q. B. Div. 1898.

M'Cabe v. Gt. Northn. Railway Co.

Boyd, J.

or when there is an executor or administrator, and he does not commence an action within six months from the death of the testator; and, unless we consider that there has been bad faith, we are not entitled to interfere with his right to do so. We are not satisfied that here there was such bad faith, and it lies on the party moving to show that there was bad faith. No doubt there was a controversy and disputes going on between the parties. Michael M'Cabe's solicitor received a letter from Owen's solicitor, stating that he would hold his hand in case he heard from him, and to that letter Michael's solicitor gave no reply, and consequently Owen's solicitor had grounds for assuming that there was no objection to his proceeding with his action. The writ in the first action being regularly issued we are of opinion that the motion should be refused.

Kenny, J.:—

I concur in thinking that this application should be refused. It is admitted by counsel for Michael M'Cabe, that there is no irregularity in the issuing of the original writ of the 31st August, and that element being now absent, the case seems to be governed by the 1st section of the amending Act. Two states of fact are contemplated by the Act. The one—where there is no executor or administrator of the person deceased—in which case any of the next-of-kin may bring an action for the purpose of asserting his rights and those of the other next-of-kin. The other—where there is an executor or administrator in existence, and he does not within six months after the death of the deceased, bring an action in his own name. In that case, again, any of the next-of-kin can institute an action. It seems to me to be clear, on the construction of the statute, that at any time after the death, if there be no personal representative in existence, any of the next-of-kin can institute proceedings. If the first action be a properly constituted one, I think the Company would be justified in relying upon the circumstance that an action for the same subject-matter had already been brought against them. Without prejudging the form of his pleading, I agree with Mr. Harrison, that he can adopt either of two courses. He can either plead, as he says, in

the second action, that there is a properly constituted suit for the same subject-matter pending, or move to stay the further proceedings in that action. In my opinion Owen M'Cabe had not done anything before the issue of the writ in his action to disentitle himself to his rights under the Act. Once it is admitted that there is no irregularity in the issuing of the writ, and that we are satisfied, as we are, that there was no bad faith, I cannot see what ground there is for dismissing the action that was first in point of time, or of staying the further proceedings in it. For these reasons I agree in thinking that the motion should be refused. We give costs both to the Great Northern Railway, and to the plaintiff, Owen M'Cabe.

J. M°G.

Appeal. Dec. 15.

The plaintiff in the second action appealed, and the Court (Lord Ashbourne, C., Fitz Gibbon, Walker, and Holmes, L.JJ.) dismissed the appeal.

Solicitor for Owen M'Cabe: *A. N. Sheridan.*
Solicitors for Michael M'Cabe: *Corr & O'Connor.*
Solicitors for the defendant Company: *Crawford & Lockhart.*

R. D. M.

Q. B. Div. Matrimonial. 1898. May 9.

BALLANCE *v.* BALLANCE (1).

Practice—Divorce, petition for, by wife—Compromise—Taxation of costs of petitioner—Payment of costs to solicitor—Form of order.

A petition for divorce was presented by a wife, and an application instituted for the usual order for the taxation of her costs. Before the hearing of the application a settlement was made by the petitioner without the knowledge of her solicitor, and she returned to cohabitation with her husband.

The Court, on the application of the solicitor for the petitioner, made an order for the taxation of the costs of the petitioner, and for payment of the amount of the taxed costs to the solicitor.

MOTION.

This was a petition by Julia A. Ballance, for a divorce *a mensa et thoro* from her husband Thomas Ballance, on the ground of cruelty. The respondent by his answer, denied the alleged cruelty, and charged that the petitioner had been guilty of cruelty to him.

Early in the year 1895, a similar petition had been filed by the petitioner and the proceedings had gone as far as joinder of issue and allocation of alimony, *pendente lite*; but a consent had been entered into, and made a rule of Court on the 3rd September, 1895, by which the proceedings were stayed, and the petitioner returned to cohabitation with the respondent.

The petition in the present case was filed on the 16th November, 1897; citation issued, 19th November; petition for alimony, 22nd November; appearance, 25th November; answer, 3rd December. The motion for alimony *pendente lite* was heard on the 15th December, when an order was made for alimony *pendente lite* at the rate of 7*s.* 6*d.* a-week. The answer to the petition for divorce was filed the 24th February, 1898, and the reply, which concluded the pleadings, on the 10th March.

On the 25th April the petitioner applied for an order that her costs already incurred be taxed and paid, and her future costs be

(1) Before ANDREWS, J.

taxed *de die in diem* and secured by the respondent, and the motion stood for the 2nd May. Before the motion came on upon that day the petitioner had served notice on Mr. Hanmore, her solicitor, that she had returned to cohabitation with her husband, and cautioning him against proceeding further with the case.

On 9th May, 1898, a motion was made on behalf of the petitioner's solicitor for an order that the petitioner's costs be taxed, and that the respondent be ordered to pay the same.

M. J. Dunn, in support of the motion :—

There is no case directly in point, but the authorities show that the rule of the Court is to secure to the wife's solicitor his costs, and he ought not to be prejudiced by a settlement made by her without his knowledge.

He referred to: *Robertson* v. *Robertson* (1); *M'Dowell* v. *M'Dowell* (2); *Carnegie* v. *Carnegie* (3); *Robson* v. *Robson* (4).

THE COURT made the following order :—

"ON motion of Mr. Dunn, counsel for the petitioner, and on reading notice of motion and motion paper, both filed the 25th of April, 1898, and the pleadings in this cause, and the petitioner having appeared personally in Court on the 2nd day of May, and stated that the case was settled, and it appearing that she has returned to cohabitation with the respondent, and that the solicitor for the petitioner had no notice of these facts up to the 2nd of May: It is ordered by the Court that all further proceedings in this cause be stayed, and the Court doth refer the costs of the said petitioner in this suit, up to and including the 2nd day of May, 1898, and of the motion then in the list of which notice is dated the 22nd of April, 1898, to be taxed by the proper officer, with notice to the said respondent; and it is further ordered that upon the solicitor for the petitioner making an affidavit that he has received no part of the said costs, that the respondent do pay such costs as ascertained by the certificate of the Taxing Master to the solicitor for the said petitioner."

Solicitor for the applicant: *Maguire.*

W. L.

(1) 6 P. D. 119.
(2) 9 L. R. Ir. 347.
(3) 15 L. R. Ir. 513.
(4) 29 L. R. Ir. 124.

Q. B. Div. Matrimonial. 1898.

June 13.

GORMAN *v.* GORMAN (1).

Practice—Place of trial.

A petition for divorce *a mensa et thoro* may be sent down for trial to an Assize town.

Summons under Order LXX., Rule 30, to fix the time, mode, and place of trial.

This was a petition by a wife against her husband, praying for a decree of divorce *a mensa et thoro* on the ground of cruelty.

Carrigan, for the petitioner, asked that a day be fixed for the trial during the present (Trinity) Sittings.

J. P. Brett, for the respondent, submitted that, owing to the number of cases in the Nisi Prius list, and the fact that ten days must elapse before the trial could take place (General Order LXX., R. 32), the cause should not be listed for the present Sittings, which so far as Nisi Prius business was concerned concluded on 30th June, and that if it were so listed the cause would not be reached, and would therefore stand adjourned till the Michaelmas Sittings. He asked that the cause should therefore be fixed for the Michaelmas Sittings, otherwise the application adjourned, or that the place of trial should be in the county Tipperary, in which all the parties resided, and the cause set down for trial at Clonmel, at the ensuing Assizes.

Andrews, J. :—

This is the first instance in which an application has been made to me to fix the trial of a matrimonial cause on circuit. Before the passing of the Judicature Act of 1897 (60 & 61 Vict. c. 66), matrimonial causes were only tried in Dublin, and

(1) Before Andrews, J.

before the President of the Probate and Matrimonial Division. There was power, under section 15 of 33 & 34 Vict. c. 110, to send an issue of fact to any of the Superior Courts of Common Law for trial, but I am not aware of this power having been exercised. By the Act of 1897 the Probate and Matrimonial Division was amalgamated with the Queen's Bench Division, and all probate and matrimonial causes were assigned to the Queen's Bench Division. I see nothing in that Act to distinguish the trial of a matrimonial cause from that of an ordinary Common Law action as regards the place of trial; and I hold that I have jurisdiction to fix the trial of this cause on circuit.

I fix the place of trial at Clonmel, and direct the trial to be had at the next ensuing Assizes.

Solicitor for petitioner: *J. P. Carrigan.*
Solicitor for respondent: *H. T. Sayers.*

W. L.

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REG. (CONYNGHAM) *v.* PHARMACEUTICAL SOCIETY OF IRELAND (1).

Oct. 28.
Nov. 1, 2, 11.

Pharmacy Acts (Ireland), 1875, 1890 (38 & 39 *Vict. c.* 57; 53 & 54 *Vict. c.* 48)—*Apprenticeship—Apprenticeship to a limited liability Company carrying on business as pharmacists—"Firm of legally qualified pharmaceutical chemists"—Statute—Regulations having, when duly approved of, the effect of statute—Subsequent statutory recognition of regulations which, when made, were* ultra vires.

The Pharmacy (Ireland) Act, 1875, which created the Pharmaceutical Society of Ireland, gives power to the Council of that body to make regulations in regard to the examination of candidates, and "generally for all such other matters as may be necessary for the due execution of this Act." By sect. 17, "all regulations made under the authority of this Act," when approved of by the Lord Lieutenant and Privy Council, and laid before Parliament, become "of the like force and effect as if they had been enacted in this Act." The Act then provides that examinations shall be held at which "all persons desirous of being registered as pharmaceutical chemists under the Act" may present themselves at such times, and in such manner as may be prescribed by such regulations, and provides that every person who shall be duly examined in accordance with the provisions of the Act, and shall be certified by the examiners as qualified, shall be entitled to be registered under the Act as a pharmaceutical chemist.

The Council made regulations, which were duly approved of and laid before Parliament, requiring that candidates for the qualifying examination should produce a statutory declaration, signed by a pharmaceutical chemist, that such candidate had served as apprentice or assistant for four years, "with, and in the sole employment of such pharmaceutical chemist . . . or of a firm of legally qualified pharmaceutical chemists . . . of which the aforesaid pharmaceutical chemist is a member." These regulations also required that a similar statutory declaration be made by the candidate.

The Pharmacy (Ireland) Act, 1890, sect. 10, provides that every person who shall serve an apprenticeship to a registered chemist and druggist, or a registered druggist not being a pharmaceutical chemist, and who "in addition shall have served an assistantship of two years to a pharmaceutical chemist," shall be entitled to present himself for examination under the Act of 1875 "as a pharmaceutical chemist," and on passing his examination to be registered as a pharmaceutical chemist.

(1) Before PALLES, C.B., and O'BRIEN and ANDREWS, JJ.

C. served an apprenticeship of over four years in the employment, for the greater portion of that period, of a registered pharmaceutical chemist, and, as regards the residue of that period, in the employment of a limited liability company carrying on business as pharmaceutical chemists, of which company all the members were, and under its articles of association were required to be, registered pharmaceutical chemists.

C. presented himself for examination in order to qualify to be registered as a pharmaceutical chemist; and, the Council having refused to admit him to the examination, he applied for a mandamus:—

Held, that this company was "a firm of legally qualified pharmaceutical chemists" within Regulation III.; that C., having complied with the rules of the Society as to apprenticeship, was entitled to present himself for examination; and that the mandamus must issue: *Reg.* (*Cleeland*) v. *Pharmaceutical Society* ([1896] 2 Ir. R. 368) discussed.

Held, further (per Palles, C.B., and O'Brien, J.), that the regulation as to apprenticeship was repugnant to the provisions of the Act of 1875, and therefore *ultra vires* when made, and that, upon the construction of this Act (sect. 17, notwithstanding), it was competent to the Court to entertain and determine the question of its validity: *Institute of Patent Agents* v. *Lockwood* ([1894], A. C. 347), distinguished; but *held*, further, that the effect of the statutory recognition contained in the enactment of section 10 of the Act of 1890, was to render the regulation valid and binding.

MANDAMUS. The applicant, W. B. Conyngham, had obtained a conditional order for a writ of mandamus directed to the Council of the Pharmaceutical Society of Ireland, commanding them to admit him to the next ensuing examination, necessary to qualify him to be registered as a pharmaceutical chemist. The Society showed cause, and now moved to have the conditional order discharged.

The applicant was apprenticed in September, 1892, to his father, Mr. Henry Conyngham, a pharmaceutical chemist, carrying on business in Dublin, and served as his apprentice for nine months, until the 30th June, 1893, when his indentures of apprenticeship were transferred to Mr. Wm. Hayes, a pharmaceutical chemist, also carrying on business in Dublin. The applicant was in Mr. Hayes' sole employment for two years and two months, ending the 31st August, 1895, when his apprenticeship was again transferred to his father, and he continued in the sole employment of his father as such apprentice for a further period of nine months, from the 31st January, 1896, to the 1st

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November, 1896. Subsequently, Henry Conyngham, William Hayes, and T. W. Robinson (also a pharmaceutical chemist) entered into an agreement, by which their businesses as chemists were converted into a limited liability company, under the style of "Hayes, Conyngham, and Robinson, Ltd.," the company being incorporated on the 8th April, 1897. The applicant served the residue of the term of his apprenticeship with this company, a further period of six months, ending the 31st December, 1897—in all, an apprenticeship of four years and two months—and during the last-mentioned term was employed in his father's establishment, Upper Baggot-street, Dublin, and under his supervision.

This company, at the date of its incorporation, consisted of seven members only, each of them being at that date, and still being, a pharmaceutical chemist, and duly registered under the Pharmacy Act. One of the clauses of the Articles of Association of the company provided that no person who was not a qualified and registered pharmaceutical chemist should be capable of holding any shares in the company.

In March, 1898, the applicant gave the necessary notice to the Council of the Society, of his desire to be examined, for the licence to act as a pharmaceutical chemist, at the examinations to be held in April, 1898, and lodged this notice with the Registrar along with the certificates of attendance at the prescribed lecture courses, and also with four statutory declarations, one by William Hayes, and the others by Henry Conyngham, that he had served a *bona fide* engagement for the periods above mentioned, in all, four years and two months, as apprentice, with and in the sole employment of the said William Hayes and Henry Conyngham respectively, "and with and in the sole employment of the said Hayes, Conyngham, and Robinson, Ltd., being a firm of legally qualified pharmaceutical chemists," for the final period of six months. The applicant, who had also made similar statutory declarations on his own behalf, had paid the proper fees, &c.

The Committee of the Council of the Pharmaceutical Society declined to allow the applicant to be examined, on the ground that the company, Hayes, Conyngham, and Robinson, Ltd., was not "a firm of legally qualified pharmaceutical chemists," within

the meaning of Regulation III. of the Society, which provided that candidates for examination for the licence, necessary to entitle them to be registered as a pharmaceutical chemist, should produce a statutory declaration, signed by a pharmaceutical chemist, that such candidate had served as apprentice or assistant for four years, "with and in the sole employment of such pharmaceutical chemist . . . or of a firm of legally qualified pharmaceutical chemists . . . of which the aforesaid pharmaceutical chemist is a member."

Joseph Day (*Gordon*, *Q.C.*, with him), for the respondents, showing cause :—

Ronan, *Q.C.*, and *Matheson*, *Q.C.* (*A. F. Blood*, with them), for the applicant :—

The company in question is a partnership of persons, each qualified as a pharmaceutical chemist, which, for convenience, has been registered as a company. It may not, perhaps, be customary to describe as a "firm," a company consisting of a large number of shareholders, who have no direct concern in the management of the undertaking; but it *is* customary so to describe any small body of persons, whether incorporated as a company or not, who are each of them actively engaged in the pursuit of their joint business. It is, therefore, submitted that, accepting Regulation III. as valid, the applicant has complied with its conditions. *Reg.* (*Cleeland*) v. *Pharmaceutical Society* (1) is not inconsistent with, even if it does not go to support, this view.

But Regulation III. is invalid and *ultra vires*. The policy and intent of the Act of 1875 was that "*all persons desirous*" of becoming pharmaceutical chemists might enter for the qualifying examinations (sects. 21, 22). To create an antecedent condition, that candidates should have served an apprenticeship, was not merely not in execution of the purposes of the Act, and *ultra vires*, but inconsistent with and repugnant to the statute itself, and therefore invalid and incapable of being enforced. Rules or by-laws must be made in pursuance of the authority given by the statute, and it is no answer to say that they *purport*, or are

(1) [1896] 2 Ir. R. 368.

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intended by their framers, to be made in pursuance of that authority. Regulation III. is an attempt to override the clear meaning of the very enactment from which alone it receives its sanction: *Irvine* v. *Askew* (1); *Ex parte Davis* (2); *Brown* v. *Holyhead Local Board* (3); *Dearden* v. *Townsend* (4); *Ex parte Foreman* (5); *Bentham* v. *Hoyle* (6); *Slattery* v. *Naylor* (7); *Selmes* v. *Judge* (8); *O'Dea* v. *Hickman* (9).

Nor can sect. 17 support the respondents' argument, for it is expressly limited to regulations made within the scope of the 16th section: "any *such* resolution and all *such* regulations when so approved of shall be of the like force and effect as if they had been enacted in this Act." What statutory effect does this confer upon a regulation not made in pursuance of the Act, not "necessary for the due execution of this Act," but directly antagonistic to its purposes?

Further, even assuming that this regulation is to be read as part of the statute, the Court must take notice of the clear repugnancy between the regulation and sects. 21 and 22. They cannot stand together, and the section should prevail over the rule.

The Institute of Patent Agents v. *Lockwood* (10) does not, it is submitted, govern the present case. There was there a far more complete and full delegation of the authority of Parliament to the rule-making body—one of the great departments of the State—the Board of Trade, to whose *discretion* the duty was entrusted in the widest terms. There Parliament had done nothing more than frame the skeleton which the rule-making body was to clothe with flesh and blood. Here Parliament has thought fit itself to make detailed provisions in regard to the examination—and the subjects of examination—of persons wishing to carry on this profession, and has merely entrusted to the Council of the Society the very limited duty of making rules for the conduct of those examinations.

(1) L. R. 5 Q. B. 211.
(2) L. R. 7 Ch. App. 526.
(3) 32 L. J. Ex. 25.
(4) L. R. 1 Q. B. 10.
(5) 18 Q. B. D. 393.
(6) 3 Q. B. D. 289.
(7) 13 App. Cas. 446.
(8) L. R. 6 Q. B. 724.
(9) 18 L. R. Ir. 233.
(10) [1894] A. C. 347.

Gordon, Q.C., in reply :—

A limited company is not a "firm" within the meaning of the regulation, and the mere fact that the articles of association, as they stand at present, provide that all members of this company shall be registered pharmaceutical chemists does not distinguish the case from *Reg.* (*Cleeland*) v. *Pharmaceutical Society* (1), seeing that those articles may be altered at any time. [Counsel also referred to *Pharmaceutical Society of Ireland* v. *Boyd* (2).]

The regulation was made, and purported to be made, in pursuance of the power conferred by the statute; the necessity for apprenticeship as a qualification for this profession is apparent; and, once the regulation received the approval of the Lord Lieutenant in Council, and was laid before the Houses of Parliament, it acquired the force of a statutory enactment, and it is no longer open to anyone to question its validity: *Lockwood's Case* (3). This was the view of at least two of the Judges who decided *Cleeland's Case* (1); and further, even assuming an original defect in this regulation, it has now, in the 10th section of the Amendment Act of 1890, received express legislative recognition, so that it would entail positive injustice and even absurdity to hold the regulation to be invalid.

Cur. adv. vult.

Nov. 11.

PALLES, C.B.—

This was an application for a mandamus to the defendants to admit the prosecutor to the examination prescribed by the 21st section of the Pharmacy Act, 1875, for persons desirous of being registered as pharmaceutical chemists under that Act.

The answer of the Council to the application is founded on the 16th section of the Act and certain rules alleged to have been made thereunder. That section empowers them, subject to the provisions of the Act, to make regulations with respect to, *inter alia*, "the examination of persons desirous of being registered as pharmaceutical chemists under this Act."

The 17th section of the Act directs that every regulation made under it shall be subject to the approval of the Lord Lieutenant

(1) [1896] 2 Ir. R. 368. (2) *Ibid.*, 394. (3) [1894] A.C. 347.

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and Privy Council, and shall be of no force or effect until so approved, and notice of this approval shall have been published in the *Dublin Gazette*. It further directs that "all regulations made under the authority of this Act, and approved as aforesaid shall be laid before both Houses of Parliament" within a prescribed time, and when so approved "shall be of the like force and effect as if they had been enacted in this Act."

The rule relied on is contained in an order of the Council of the 17th November, 1887, which was approved by the Lord Lieutenant and Privy Council, published in the *Gazette*, and laid before both Houses of Parliament. By Rule III. (*a*) of that order, candidates for the licence are required to produce a statutory declaration, signed by a pharmaceutical chemist, stating that the candidate has served a *bona fide* engagement for a term of four years, or for two or more terms amounting to four years, as his apprentice or assistant, in the sole employment "of such pharmaceutical chemist, . . . or of *a firm* of legally qualified pharmaceutical chemists of which . . . the aforesaid pharmaceutical chemist . . . is a member."

It appeared from the declaration of the pharmaceutical chemist in the present case, that one of the terms which made up the four years served by the applicant had been so served by him with an incorporated company, registered under the Companies Act of 1867, whose articles are so prepared that, under them, so long as they remain unaltered, no person can be a member of it who is not "a legally qualified pharmaceutical chemist."

The Council say that this incorporated company, although thus restricted in its membership, is not a "*firm* of legally qualified pharmaceutical chemists," within the meaning of the rule in question.

To this answer of the Council, the prosecutor says: 1, that the rule was not one which was authorised to be made by the 16th section of the Act; and 2, that, even if it were, the incorporated company is a "*firm* of legally qualified pharmaceutical chemists," within the meaning of the rule.

In answer to the allegation that the rule was *ultra vires*, the Council, in addition to insisting that it was authorised by the Act,

say that, having regard to the frame of s. 16, it is not competent to this Court to inquire whether it is or is not *ultra vires*, and further, that even if the rule were originally *ultra vires*, it was validated by the 10th section of the amending Act of 1890.

Thus we have to determine four questions:—

1. Are we at liberty, notwithstanding the terms of s. 16, to consider whether the regulation is *ultra vires?*

2. If we are, was it *ultra vires* when made?

3. If so, was it validated by the Act of 1890?

4. If so, is the incorporated company "a *firm* of legally qualified pharmaceutical chemists," within the meaning of the regulation?

Of these questions, by far the most important is the first, having regard to the wide application a decision upon it must necessarily have upon our numerous Acts which authorise the making of rules and regulations. It is admitted that, were it not for the enactment that the regulations, when approved, "shall be of the like force and effect as if they had been enacted" in the Act, the Court would be competent to consider whether the rule was *ultra vires: Attorney-General* v. *Sillem* (1).

Now, the words of the enactment are that "all *such* regulations, when so approved," shall have the specified effect. To what does the word "*such*" refer? To the regulations previously mentioned, "regulations made under the authority of this Act." So that, in words, the conclusive effect is given to the regulations only if they answer the description of having been "made under the authority of" the Act. The argument for the Council is that this means, not regulations within the power conferred by the Act, but regulations "*purporting* to be made under the authority of the Act," whether they are, or are not, in law authorized by it.

The question is, whether we are to introduce by interpretation this word, "purporting," into the section? Were there no authority upon the point, it would appear to me to be quite clear that we should not do so. It is said, however (and this is the matter which renders the question such an important one), that

(1) 10 H. L. Cas. 704.

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we are bound by the decision of the House of Lords in *The Institute of Patent Agents* v. *Lockwood* (1), to hold that the section must be read as if it contained the word "purporting." The question there arose upon the construction of section 1 of the "Patents, Designs, and Trade Marks Act, 1888." That section enacted that after the 1st July, 1889, a person should not be entitled to describe himself as a "Patent Agent," unless he were registered as such in pursuance of the Act. By sub-section 2 the Board of Trade were directed to make such general rules "as are, *in the opinion* of the Board, required for giving effect to this section," and there is a reference to the provisions of sect. 101 of the Patents Act of 1883 of such a character that, subject as in that section mentioned (a limitation not material to the question here), such general rules were to be "of the same effect as if they were contained in the Act," to be "judicially noticed," and to be "laid before both Houses of Parliament"; and a power is reserved to each House to resolve, within the prescribed time, that the rules, or any of them, ought to be annulled, in which event the same are after the date thereof to be of no effect. Sub-section 3 of sect. 1 of the Act of 1888, enacted that every person who proved to the satisfaction of the Board that, prior to the passing of the Act, he had been *bona fide* practising as a Patent Agent, should be entitled to be registered.

The rule on which the judgment of the House of Lords proceeded, provided for the payment of entrance fees and annual fees by all Patent Agents on the register, including those who had been *bona fide* practising Patent Agents, prior to the passing of the Act.

Upon the construction of these sections it was held by the House of Lords that it was not competent to them to question the validity of the rules; and it is said that this decision applies equally to the section which is under consideration here—a section of a wholly different frame and scope. Indeed it is insisted that it lays down a general rule of law, for the guidance of all subordinate tribunals, in reference not alone to such a section as was there considered, but to all cases of enactments which confer on a

(1) [1894] A. C. 347.

body a power of making rules for certain defined and limited purposes, provided only the enactment directs that when made they shall be of the same effect as if they were contained in the Act. An attentive analysis of the opinions of the learned Lords has satisfied me that they did not intend to lay down any such general rule as has been insisted upon here, and that the essential basis of the decision there was the generality of the power, coupled with the right to annul reserved to each House. The subject-matter of that power was not such rules as were, in law, or according to judicial rules, "required for giving effect" to the section. The subject-matter was "such rules" as "*in the opinion of the Board*" were so required. The sole limitation to the extraordinarily extensive power is "*the opinion of the Board*," and this circumstance is expressly made part of the *rationes decidendi* of the Lord Chancellor and Lord Watson.

Now, as the making by the Board of "a rule" for the purpose of giving effect to a section, involves the opinion of the same Board that it is so required, any rules so made must be within the words of the power. This circumstance is referred to in, and made part of the opinion of, Lord Watson. The power, therefore, was something wholly different from an ordinary power to make rules or bye-laws. It was, in truth, a delegation to the Board, subject to one limitation only, of the power of determining what was necessary for the required purpose. The exception I refer to is the power reserved to each House to annul the work which, subject to the power to annul, was to be their work. This fact, too, is made part of the *ratio decidendi*.

It has, however, been contended that the Lord Chancellor, in giving his opinion as to the effect of the words "shall be of the same effect as if they were contained in this Act," assumed that the rule there was *ultra vires*. Consequently, it is suggested that there might have been a rule which would have been *ultra vires*. No doubt there might have been. One instance of such a rule is referred to by the Lord Chancellor, viz. a rule which would be in contradiction to the express provision of the Act.

Therefore, where, as there, there was no express limitation, there must have been some implied one. This implied limitation is, to my mind, that which the Lord Chancellor proceeds to consider

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under the second head of his opinion, viz. that under which, after he had shown that the rules were *intra vires*, he proceeds to state his opinion as to the effect of the rules being directed to be laid before Parliament, and to be "of the same effect as if they were contained in" the statute. He says:—"It is said that it is only rules properly made under sub-section 2, which can become part of the Act and be treated as such"; and having read the words of the sub-section, he adds:—"*Therefore* any rule which, *in the opinion* of the Board of Trade, is required to be made in order to give effect to the section, *is* a rule made pursuant to the provisions of sub-section 2, and is to be dealt with as if made in pursuance of section 101 of the principal Act. If not so annulled, or until annulled, what is the effect? 'They are to be of the same effect as if they were contained in this Act.' My lords, I have asked in vain for any explanation of the meaning of those words, or any suggestion as to the effect to be given to them, if, notwithstanding that provision, the rules are open to review and the consideration of the Courts. . . . The effect of a statutory rule, *if validly made*, is precisely the same—that every person must conform to its provisions. . . . I own I feel very great difficulty in giving to this provision, 'that they shall be of the same effect as if they were contained in this Act,' any other meaning than this, that you shall, for all purposes of construction, of obligation or otherwise, treat them exactly as if they were in the Act."

It will be seen that the entire of this reasoning is based on the antecedent proposition, that "any rule which, in the *opinion* of the Board of Trade, is required to be made in order to give effect to the section, is a rule made pursuant to the provisions of sub-section 2."

It is said that the Lord Chancellor, in this part of his opinion, assumes that the rule was not "properly made under sub-s. 2." In my opinion, the assumption of the learned Lord Chancellor was, not that the rule was *ultra vires*, in the ordinary sense of the term, because his opinion was that no rule, which in the opinion of the Board of Trade was necessary for carrying out the section, could be *ultra vires* in that sense, but that it was 'not properly made,' if it was such as, when read into the Act,

would be repugnant to the Act. "In that case," he says, "probably the enactment itself would be treated as the governing consideration, and the rule as subordinate to it."

All this, in my opinion, means that once you bring the rule within the words of the power, then, if it is not repugnant to some other provision of the Act, it is to be read as if it were in the Act; but if it be repugnant to some other provisiom, it is to be deemed subordinate to the provision to which it is repugnant. But all this presupposes that the rule is within the words of the power.

The *ratio decidendi* of Lord Watson was "that the whole scheme was left to the discretion of the Board of Trade." "It was *by their opinion*, not by any judicial opinion, that the matter was to be determined," and, after referring to the check retained by the Legislature, by requiring the regulations to be laid before both Houses, and by retaining power to annul them upon a motion in either House, he asks:—"What is the effect if no such motion be made or carried, or if a motion hostile to the scheme be made in both Houses, and rejected by both? The statute makes no difference between those cases." He then holds that all doubt upon the subject is removed by section 101 of the Act of 1883, "that any rules made in pursuance of this section" . . . should be of the same effect as if they were contained in this Act, and adds:—"In regard to those words . . . I do not think I can express my meaning more clearly than by saying that I think they mean exactly what they say. *Such* rules are to be as effectual as if they were part of the statute itself. What rules are here referred to by the word 'such'? Regulations made by the Board of Trade in pursuance of sect. 1, sub-sect. 2, of the Act of 1888. But what were those regulations? The rules which are, '*in the opinion*,' not of a Court of law, but of the *Board of Trade*, required for giving effect to the section, and the fact that the Board made the rules showed that, in their opinion, they were so required."

To the same effect is the judgment of Lord Russell of Killowen. After stating that he thought the rules were *intra vires*, and therefore valid and binding, even apart from the provision of sect. 101 of the Act of 1883, he adds:—"I think that *if* the rules are to be read as part of the Act, *as I think they ought to be*, it is not *in this case* competent to judicial tribunals to reject

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them"; and his subsequent words show that in his opinion the only matter left open for consideration was "the effect to be given to them," which of course would be dependent upon their judicial construction, taken in conjunction with the provisions of the Act under which they were made.

I am of opinion that the judgment there depended on the conjoint effect of the generality of the power and the reservation to either House of power to proceed to annul the rules; that the decision does not apply to a section worded as is the present; and that therefore it is competent to us to determine whether or not the rule is *ultra vires*.

This brings me to the second question, upon which I think no doubt can be entertained. By section 16, "the Council may, subject to the provisions of this Act, make regulations with respect to . . . the examination of persons desirous of being registered as pharmaceutical chemists under this Act." By section 21, "all persons desirous of being registered as pharmaceutical chemists under this Act may, at any such examination, present themselves for examination." That is, the Council may make regulations with respect to the examination of *all persons desirous* of being registered. They cannot, under that power, cut down the generality of the words "all persons desirous" in section 21, and limit them to those who have served four years' apprenticeship. The rule is not only repugnant to the Act but it is in respect of a subject matter as to which the power to make rules did not exist.

The third question is, the effect upon the rule of the Act of 1890. This question has not been as fully argued as might have been desired, and seems to me to be one of no small difficulty; but the opinion at which I have arrived, after much consideration, is, that the Act of 1890 does validate this rule. The 10th section enacts that every person who shall have served an apprenticeship to a registered chemist and druggist, or a registered druggist not being a pharmaceutical chemist, and who . . . in addition shall have served an assistantship of two years to a pharmaceutical chemist . . . shall be entitled to present himself for examination under the Act of 1875, "as a pharmaceutical chemist, and shall be entitled, on passing his examination, to be registered as a pharmaceutical chemist."

Now, if this section be read without any reference to the Privy Council Order, it is simply absurd. It plainly was passed in the case of certain persons, who had served apprenticeships of a certain length to registered chemists and druggists, or to registered druggists, and it purports to enable such persons to present themselves for examination upon serving an apprenticeship of only two years to a pharmaceutical chemist; whereas, if the Privy Council Order were *ultra vires*, they would have been entitled to present themselves without serving any apprenticeship or any assistantship. We are not bound, by any rules of interpretation, to give the Act this absurd construction. We must ascertain the intent of the statute; and "that which is done by the intent of any Act without precise words is equivalent to that which is done by express words" (1).

I think that we must presume the existence of the only state of facts which will prevent absurdity, viz. that the Legislature had before them, when they passed the Act of 1890, the fact that the order in question had been made. I therefore construe the statute as if that order had been recited in it. No doubt its mere recital would not have been sufficient to validate it (2). But the statute here goes further; it intends to give and purports to give a privilege to a particular class which was not to be possessed by other members of the public. The Legislature, therefore, recognised the rule as binding, and further legislates on the basis of it in such a way that its intent cannot have effect unless the order be valid; and this, I think, makes it valid.

Holding then that, in the events which have happened, the order has become binding, the last question is whether the incorporated company is "a firm of legally qualified pharmaceutical chemists"?

It is an incorporated company of legally qualified pharmaceutical chemists. No person other than such a chemist can, according to the present constitution of the company, be a member of it. True, the articles of association may be altered. When, if ever, they are so altered in such a manner that a person, not a pharmaceutical chemist, may be a member of it, another question will

(1) Plowd. 248. (2) 11 H. L. C., 518.

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arise; but, to the present, every member not only is, but must be, a legally qualified pharmaceutical chemist. Therefore the question is reduced to this: must the word "firm," as used in this rule, be necessarily limited to an unincorporated partnership?

Now, these rules were made, not by persons to whom legal knowledge is to be attributed, but by a council of traders, and the language is to be construed as theirs. As shown by the Master of the Rolls in England (1), merchants and lawyers have different notions with respect to the nature of a firm. Commercial men and accountants are apt to look upon a firm in the light in which lawyers look upon an incorporation, *i.e.*, as a body distinct from the members composing it, and having rights and obligations distinct from those of its members. Hence, in keeping partnership accounts, the firm is made debtor to each partner for what he brings into the common stock, and each partner is made debtor to the firm for anything that he takes out of that stock. In a mercantile view, partners are never indebted to each other in respect of partnership transactions, but are always either debtors to, or creditors of, the firm. An incorporated company more nearly represents this idea than does an ordinary partnership, and I see no reason for excluding it from, but many for including it within, the term "firm," which is large enough to embrace it.

The object and intent of the rule was, that the candidate should have undergone a course of training under pharmaceutical chemists; and this object is satisfied, whether the persons whom he serves are or are not incorporated.

Upon the whole, my opinion is that the order must be made absolute.

O'BRIEN, J.:—

From the beginning I have entertained no doubt whatever upon the last proposition discussed by the Lord Chief Baron, that, not merely in accordance with the ordinary use of language, but within the stricter application of technical rules of law, the prosecutor, upon the facts disclosed in this case, has proved a full compli-

(1) Lindley on Partnership, p. 110.

ance on his part with the requirements as to apprenticeship of the rule in question. I do not indeed agree exactly in the view of the Chief Baron as to the meaning which, it is suggested, commercial men attach to the word "firm," of an entity different from that of the persons composing it. It appears to me that the word here has the same meaning as it bears in the ordinary use of language, denoting a trade carried on by several persons, and that in this rule it is not used to imply in any way a distinct entity, but to mark the distinction between serving an apprenticeship to a firm or being in the sole employment of an individual pharmaceutical chemist; for to serve an apprenticeship or to be in the employment of a "firm of legally qualified pharmaceutical chemists" means the same thing as in the employment of several pharmaceutical chemists. It occurs to me that not only would the prosecutor have complied with the regulation by acting as assistant to a company consisting of several pharmaceutical chemists, but that he would in so acting have strictly and fully complied also with the earlier part of the rule requiring service in the employment of *one* pharmaceutical chemist; and I see no reason in point of law why any person desiring to acquire this profession or trade might not qualify himself within the description of having been an assistant to a legally qualified pharmaceutical chemist by a sufficient service in the employment of several pharmaceutical chemists whether incorporated as a company or not.

It is certain, however, that the members of this particular company were each of them fully qualified as pharmaceutical chemists, and I should find great difficulty in drawing any argument, such as was suggested at the Bar during the course of the case, from the position of an incorporated company with regard to the unauthorised sale of drugs or prescriptions. It is said that the company cannot be made liable, and that the entities of Hayes and Cunningham and the other members of this company were lost entirely in the new entity, the company; but it seems to me, so far as any application of this argument to the present case is concerned, to be a misuse of the technicalities of law to suggest that because an incorporated company cannot be made liable to certain penalties as a company, it cannot still contain in itself or in its constituent members the elements necessary to communicate

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instruction to an apprentice. To give effect to such a proposition would be—to use the phrase we heard so often during this argument—to deprive the members of flesh and blood, if, by reason of their being united in a company they could not still carry with them the same qualities which, as individual pharmaceutical chemists, would enable them to give the instruction that the rules require. In my view, therefore, the prosecutor was entitled to present himself for examination by the Society, and had fulfilled the condition laid down by the rules.

The other questions that remain are of very great and wide importance. The most important one is whether the decision of the House of Lords in *The Institute of Patent Agents* v. *Lockwood* (1) governs this case. In my opinion it does not—for a reason however entirely different from that expressed by the Chief Baron. I consider that that case, except only for the reason to which I refer, would have been an authority directly binding upon us.

The decision of the House of Lords was pronounced upon an Act of Parliament, similar in its terms and in the objects for which it was passed, to the Pharmacy Act of 1875. The Pharmacy Act evidently arose out of the necessity for, and was intended to provide for, the creation of a proper register of pharmaceutical chemists—just as there is a register of physicians—for the greater safety of the community, and, no doubt, also for the advantage of the persons through whose endeavours the law was passed. That was the immediate and direct object of the Act—the institution of this register; and a similar object, the institution of a register of chemists and druggists, was what was contemplated by the Act of 1890. In the same way, in regard to the case before the House of Lords, the object of the Acts of 1883 and 1888 was really confined to the institution of a register of patent agents, the appearance of any name on which would be a guarantee of the person's qualification. In this respect these two latter Acts are almost precisely similar to those with which we are now dealing; in other respects also there is a marked similarity; and I do not think that the distinction taken by the Chief Baron can be entirely maintained upon a careful scrutiny of the terms of the Patents Acts of 1883 and 1888.

(1) [1894] A. C. 347.

Under the Act of 1883 (sect. 101) the Board of Trade may from time to time make "such general rules . . . as they think expedient, subject to the provisions of the Act—(*a*) for regulating the practice of registration under this Act." Sub-section 3 then provides that "general rules may be made under this section . . . . and shall (subject as hereinafter-mentioned) be of the same effect as if they were contained in this Act." It was further provided (sub-sects. 4 and 5) that any rules made in pursuance of the section should be laid before both Houses of Parliament, and that, if either House of Parliament, within the next forty days after any rules had been so laid before such House, resolved that such rules, or any of them, ought to be annulled, the same should after the date of such resolution be of no effect. The Pharmacy Act of 1875 instituted a rule-making body certainly of not less authority than the Board of Trade, namely, the Privy Council and the Lord Lieutenant of Ireland. It is quite true that when this Act comes to deal with the subject of the qualifying examination it gives certain precise directions; but it seems to me that its provision for the making of rules and regulations is in other respects quite as general as the provision in the Patents Acts. The final clause at the end of the section, introduced lest there should be any miscarriage—that the power to make rules should be "generally for all such other matters as may be necessary for the due execution of this Act—is a provision which confers precisely the same powers, in almost precisely the same terms, and is of the same extent, as the provision in the Patents Act of 1883 where the words are that the Board of Trade may make "such general rules as they think expedient, subject to the provisions of this Act." I find it impossible to treat that power save as being of precisely the same kind as that with which we have here to deal. The like provision in the Patents Act of 1888 (section 1, sub-section 2), that the Board of Trade shall make "such general rules as are in the opinion of the Board required for giving effect to this section," does not, in my opinion, give any other authority to the Board of Trade than they already possessed under the Act of 1883; and I cannot see that there is any substantial difference between the nature and extent of the authority of the Board of Trade under those Acts and of the Privy Council and the Lord Lieutenant in the case before us. Further-

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more, it does not occur to me that any of the grounds upon which Lord Herschell based his opinion are sufficient to distinguish that case from the present one. The judgments have been fully discussed by the Chief Baron, and I do not wish to deal again with them in detail; but, in the result, their effect, broadly speaking, was this—that there was to be a rule-making body, the Board of Trade, to which the law would, it is said, assign particular credit as being a department of the State. I do not, however, think that any good reason can be given for assigning to the Board of Trade any higher authority than attaches to the Privy Council and the Lord Lieutenant of Ireland; and it seems to me that any argument founded upon the nature of the rule-making authority is expressly excluded from consideration by legal decision; for in the case of *Ex parte Foreman* (1) the rule-making authority included no less a person than the Lord Chancellor of England, and yet all the Judges who decided that case carefully avoided any expression of opinion—whether or not the point was necessary to be decided—that the statutory efficacy of the rule in question was conclusive. They certainly placed no complete reliance upon the fact that the rule-making authority consisted of the Lord Chancellor acting with the concurrence of the President of the Board of Trade.

I therefore pass away from this to the second ground of Lord Herschell's judgment, which was this, that there was there, in reality, something in the nature of a *delegation* of its authority by Parliament; and, though the Chief Baron has used this expression with a certain degree of assent, I, for myself, do not see that anything in the nature of a delegation could give any greater power than the words of the statute itself. The statute in that case, it is said, provided a mere framework and skeleton, which was to be clothed with flesh and blood by the Board of Trade; but surely that is no more than is done under the Pharmacy Act, where the framework has equally to be clothed by rules and regulations passed by the Society, and approved of by Order in Council. It is the very same function that has to be performed in both cases.

The third ground of Lord Herschell's decision was that sect. 1, sub-s. 3, of the Act of 1888 conferred some new or further

(1) 18 Q. B. D. 393.

power upon the Board of Trade. It is extremely difficult to see how the new phrase introduced in that sub-section could make any difference at all. Such rules (the section states) shall be made "as are *in the opinion of the Board* required" for giving effect to the section; but surely it must be assumed that the Board, in making any rule, would act in accordance with its opinion, and analogies may easily be found in the law showing that a reference to such a discretion cannot affect the matter. Lord Herschell seems further in the first instance to assume that a rule made by the Board of Trade under sub-section 3 was necessarily in its own nature final and unquestionable, and that the effect of the later Act of Parliament was to carry that conclusiveness into the general clause contained in section 101 of the Act of 1883, bringing it into the same degree of efficacy with itself; but it would occur to me that this could make no difference whatever in the construction, and that the question would still remain the same, whether the Legislature in passing the Act of 1888 had assigned to the Board the same power as under the earlier Act, or had created a power of the same efficacy, but without reference to that earlier Act.

The last and most important ground of comparison between this and *Lockwood's Case* (1) is that there the rules were to be laid before both Houses of Parliament, and that a power was reserved to avoid and annul any of them by a resolution of either House; and it is important to bear in mind that, by the express terms of the Act, these rules had assigned to them the same statutory efficacy in the interval of time while it was open to the Houses of Parliament to annul them, as afterwards. The same thing exists here under the Pharmacy Act of 1875, for the rules which are to be laid before Parliament have exactly the same degree of efficacy attributed to them before they are so laid as thereafter; they are equally as effective as are the rules under the Patents Acts until annulled. Lord Morris, who pronounced a dissenting judgment in *Lockwood's Case* (1) made an observation of great weight when, in regard to this argument, he said that he had come to the conclusion that it would make no difference whatever whether this power was reserved or not. Suppose any one of these rules was

(1) [1894] A. C. 347.

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annulled by resolution of either House; after that, it would cease to have the effect of an Act of Parliament; but it would have had that effect till then. If one rule was annulled the remainder would still have the same efficacy, and for this reason he excludes the argument from consideration.

I have not, I confess, received the same impression as the Chief Baron of the result of the opinions of the other Law Lords. It appears to me that Lord Watson's judgment is expressly and distinctly independent of the various grounds put forward by Lord Herschell upon the question whether these rules were *ultra vires*; and Lord Herschell himself, at the end of his judgment, clearly relies upon the clause of the Act of 1883 that assigned to the rules the effect and conclusiveness of a statute, basing his view upon the words of the statute alone, and manifestly proceeding altogether on this ground in the argument used by him that the words of the clause would be meaningless unless they had this effect.

A question of great difficulty has arisen to my mind, whether, supposing we come to the conclusion that the judgment of the House of Lords was based upon certain grounds which this Court may deem insufficient, its decision would not still be absolutely conclusive upon us, and it seems to me that it would be the duty of the Court to come to the conclusion that, even though erroneous grounds were assigned in the House of Lords, still this Court would be bound to apply the analogy of the Act of Parliament on which their judgment went to the construction of any other Act in which the same or similar words occurred, assigning statutory efficacy to rules made for the purpose of carrying out the Act,—a consideration of the gravest importance at the present moment, having regard to the scope of the rules to be made under the Local Government Act of the present year.

If, then, the judgment of the House of Lords does not stand in the way, I must express my opinion that the rule we are now considering was not only *ultra vires*, but went, if possible, a great deal further than that. It is quite certain to my mind that the rule requiring a certificate that the candidate has served an apprenticeship for a certain number of years to a pharmaceutical chemist was made not only in violation of the authority given by the Act of Parliament, but was an extremely skilful and carefully planned

departure from the intention of the Act of Parliament; for the rule was beyond all doubt designed and intended to bring within the net of this newly constituted body of pharmaceutical chemists the whole trade of this country connected in any way with the sale of drugs. Their object may have been a very laudable one, to prevent, it may be said, risks to life and health, which the community might have only too good reason to apprehend if persons could be registered as pharmaceutical chemists, and permitted to sell poisons, and compound prescriptions, without any previous practice whatsoever, and without being possessed of that art and dexterity which is required in the manipulation of drugs, an acquirement which is considered essential in medical examinations, and necessary in the interests of the public. But where in the Act of Parliament is any authority to be found for such a rule as this requiring a four years' apprenticeship? The one object of the Act was to create a register; this was to be carried out under the Act; and how are these rules to extend its primary or only object? The Council of the Society are to hold examinations, and the statute prescribes the subjects of these examinations, gives a power to charge fees, and to make certain rules in execution of the purposes of the Act. But this rule is not that persons shall present themselves for examination, or that they shall pay their fees, or that they shall do any other thing required in pursuance of anything contained in the Act, or that the examination should be confined to the subjects prescribed by the statute, there being certain subjects in which a candidate is not to be examined. No, although the whole machinery of the rule-making power is manifestly confined to, and concerned with, the examination of candidates seeking to become qualified, and the registration of qualified practitioners, the Council of the Society—instead of making rules so that all persons desirous of joining the profession may present themselves for the qualifying examination—go back a period of four years and prescribe an antecedent qualification that might involve an apprenticeship commencing even before the Act came into existence at all—a matter most certainly and clearly entirely outside the range of the authority given by the Act of Parliament. Therefore, in my opinion, this rule was distinctly *ultra vires*.

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The present case, for this reason, goes far beyond *Lockwood's Case* (1). No doubt, wherever statutory efficacy is given by Parliament to rules made pursuant to a statute, the House of Lords and all subordinate tribunals, wherever similar words occur, must follow that decision. But, though the House of Lords' decision is conclusive in all such cases, it does not, in my opinion, govern the present, for the distinct reason, glanced at by the Lord Chief Baron, but not, I think, made part of the ground of his decision, that this is really not a case of applying the principles of *ultra vires* or *intra vires* at all—principles conversant with rules made in execution of the objects of an Act of Parliament, or in professed pursuance of an Act. This rule in question can hardly even be suggested to be a rule made in professed pursuance of the Act, or of the objects contemplated by the Legislature. It is nothing of the kind; it was made for a wholly different purpose, with an object, and in regard to a subject-matter, in my opinion, wholly and completely unauthorised, even more unauthorised than, for instance, a rule would be that only persons within a certain age, say within the age of forty years, should be admitted for examination. This is not a rule for the examination of intending candidates; it is a rule avowedly made for the purpose of constituting a personal status in the candidates, reaching back to a period of no less than four years prior to the time when they present themselves for examination, a thing completely and utterly unauthorised, and in my view outside the Act of Parliament altogether.

To show that the decision of the House of Lords cannot apply at all to a case of this kind, I must again refer to the statute in regard to which that decision was pronounced—the Patents Act of 1883—it being there held that a rule made under the Act of 1888 was to be brought within the power and scope of the earlier Act. The Board of Trade (it was provided), may "from time to time make such general rules as they think expedient, subject to the provisions of this Act." For what was that power given? "For regulating the practice of registration under this Act." The decision of all the members of the House of Lords was confined to a consideration of rules made for that express and

(1) [1894] A. C. 347.

limited object. How then can it be said that this decision is to be applied to a rule or regulation not made for the purpose of carrying out the objects of the Legislature, but made for the purpose of establishing a wholly unauthorised antecedent qualification, referring back to a point of time already long past? On that one ground, in my opinion, the decision in *Lockwood's Case* (1) cannot be applied in determining the present question.

I now come to the last point—the effect of the 10th section of the Act of 1890—in regard to which I still adhere to the opinion I formerly expressed, that the skilful hands who drafted this amending Act were fully aware of the infirmity of the rule requiring apprenticeship. It had been doubtless observed that such a rule was wholly outside the authority of the Society; and they intended to avoid any difficulty that might possibly arise. I have come to the conclusion—though perhaps not upon precisely the same grounds, or for reasons that can be expressed in exactly the same way, as those upon which the judgment of the Chief Baron proceeds—that sections 10 and 11 of the Act of 1890 must be had regard to in dealing with this rule made under the Act of 1875, and that their effect is to validate it, no matter what its inherent infirmity was. [His Lordship read section 10 and continued.] The Legislature, in enacting this section must have had under its consideration, and must reasonably be assumed to have had within its knowledge, the existence of the rule made under the earlier Act; and, though I do not consider that section 10 can be treated, strictly speaking, as legislation upon the basis of antecedent existing law, still in my judgment we are bound to come to the conclusion that Parliament had before it the Act of 1875 and the rules thereunder, when the Act of 1890 was passed, and did intend to validate these rules; and I take section 10, not as legislation upon the basis of previous legislation, but as a legislative declaration that the rule then in existence concerning apprenticeship was valid, and necessarily requiring it to be assumed as *intra vires*, and that accordingly it has the effect of rendering it valid. And it is quite clear that this was the intention of

(1) [1894] A. C. 347.

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Parliament, for in the Act of 1890, a provision exactly parallel to that which existed in regard to pharmaceutical chemists is introduced in regard to chemists and druggists, and it is manifest that the legislature intended to give efficacy to this existing rule, and that, therefore, to all intents and purposes it has now obtained the authority of an Act of Parliament.

ANDREWS, J :—

The question of the validity of Regulation No. III. of the Pharmaceutical Society, for the examination of persons desirous of being registered as pharmaceutical chemists under the Pharmacy (Ireland) Act, 1875 (38 & 39 Vict. c. 57), has been raised in this case, and, up to a certain point has been dealt with by what may be properly described as argument. In this respect, this case differs from *Reg.* (*Cleeland*) v. *The Pharmaceutical Society of Ireland* (1), in which this question cannot be regarded as having been argued; and, although, for reasons which I shall state, I do not intend to give a decision upon it, I do not feel that I can properly pass over it, having regard to the decision of the House of Lords in *Lockwood's Case* (2), and the far-reaching effect which has been sought to be given to that decision.

If this question were to be determined upon the consideration of the regulation, and of the Act of 1875 only, I should be quite prepared to hold that the regulation was *ultra vires*, and briefly for these reasons. I cannot accept Mr. Gordon's contention that the question is not one of construction. I think it clear that it must be determined, in the first place, and as a matter of construction, what is the power which the 16th section of the Act of 1875 conferred on the Council; and, upon the construction of that section, it appears to me to be beyond doubt that the power thereby expressly given to the Council to make regulations "subject to the provisions of this Act," cannot be exercised so as to make any regulation which would be at variance with any of these provisions. One of these is contained in the 21st section, and is enacted in the following unambiguous terms, viz.: "All

(1) [1896] 2 Ir. R. 368. (2) [1894] A. C. 347.

persons desirous of being registered as pharmaceutical chemists under this Act, may, at any such examination, present themselves for examination, and they shall be examined with respect to their knowledge of" the subjects therein referred to.

With reference, therefore, to the regulation in question, the power of the Council, as conferred by the 16th section, must be read thus—The Council may, *subject to the provisions of the 21st section*, make regulations with respect to the examination in question. But this regulation is not made subject to the provisions of the 21st section, which I have quoted. It is obviously at variance with it. The provision entitles all persons to present themselves for examination. The regulation denies this right to all, and seeks to restrict it to those who have previously served the therein-mentioned engagement of four years, as such apprentices, or assistants, as therein mentioned. Pausing here, could there be the slightest doubt that the regulation is *ultra vires*? But then it is said that, even granting this, the 17th section of the Act of 1875 precludes any Court from questioning the validity of the regulation, because, as it was approved of by the Lord Lieutenant and Privy Council, it has, by the concluding paragraph of that section, acquired the like force and effect as if it had been enacted in that Act. This argument appears to me to overlook or ignore the opening words of the 17th section. It is not to *every* regulation so approved that the force and effect of an enactment are given. Such force and effect are, by what appear to me to be apt and clear words, expressly limited to regulations "*made under the authority of this Act.*" We have no right to alter these clear and precise words, by altering the words into "*purporting to be*" so made, which would largely extend them; and, in my opinion, it is only necessary to refer to the 21st section to show, without leaving room for doubt, that the regulation in question was not made under the authority of the Act, but in excess of its authority, and at variance with one of its express provisions.

However, it is further said that this Court, and every Court, is now precluded by *Lockwood's Case* (1) from holding what otherwise would, as it appears to me, have been so plain. In my opinion,

(1) [1894] A. C. 347.

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the present case is unaffected by *Lockwood's Case* (1). The statutory power conferred on the Board of Trade to make the rules in question in that case was "to make such general rules as are, *in the opinion of the Board*, required for giving effect" to the enactments under consideration in that case. Lord Watson, in giving judgment, said (2):—"Now it appears to me that the whole scheme was left to the discretion of the Board of Trade.... It was by their opinion, not by any judicial opinion, that the matter was to be determined." Lord Russell of Killowen said (3):—"But further I think that, if the rules are to be read as part of the Act (as I think they ought to be), it is not, *in this case*, competent to judicial tribunals to reject them." Lord Morris, notwithstanding the special words by which the power to make rules was conferred on the Board of Trade, did not think the Court was precluded from questioning their validity. He said (4):—"But if a Court of Justice (before whom all these questions must ultimately come) considers that certain rules are rules which do not come within this section, in my opinion, they would be *ultra vires*, and it would be the duty of the Court not to regard them as operative." Stress has been laid on some passages in Lord Herschell's judgment; but the language of a judgment should be read as a whole, and with reference to the subject on which it is given. The rules in question in *Lockwood's Case* (1), were held to be *intra vires*, having regard to the terms in which the power to make them was conferred. After dealing with that part of the case, Lord Herschell went on (5) to consider the further question whether their validity could be canvassed in the Courts, when once the rules had been made by the Board of Trade and laid as provided on the tables of both Houses of Parliament. He proceeded thus: "It is said that it is only rules properly made under sub-sect. 2, which can become part of the Act and be treated as such. My lords, the words of sub-sect. 2, are, 'The Board of Trade shall, as soon as may be after the passing of this Act, and may from time to time make *such general rules as are in the opinion of the Board required* for giving effect to this section, and the provisions of section 101 of the principal Act shall

(1) [1894] A. C. 317.
(2) *Ib.* 364.
(3) *Ib.* 367.
(4) *Ib.* 366.
(5) *Ib.* 359.

apply to all rules *so* made as if they were made in pursuance of that section.' Therefore any rule which, *in the opinion of the Board of Trade*, is required to be made in order to give effect to the section, is a rule made pursuant to the provisions of sub-section 2, and any rule made pursuant to the provisions of sub-section 2, is to be dealt with as if made in pursuance of section 101 of the principal Act." I cannot but think that what I have quoted from Lord Herschell's commencement of his judgment, upon the question whether the rules he was dealing with could be canvassed in the Courts as *ultra vires*, is the key to the rest of his judgment on this question, isolated passages in which cannot therefore be relied upon as laying down the law with reference to so materially different a statutory power as that conferred by the 16th section of the Act of 1875; and therefore I cannot regard any passage in Lord Herschell's judgment, in that case, as controlling this Court in the present case, which, as I think, is in material respects a very different one, even if the opinion of one noble lord, given on a question which it is not necessary to decide, can ever bind all other Courts, although not adopted by the other noble lords, and dissented from by one of them—a proposition to which I certainly could not assent.

I refrain however, from going more fully into this branch of the present case, because I do not, as I have already said, intend to give a decision upon it, and for this reason. A very serious question was touched on during the argument, viz. whether, assuming Regulation III. to have been *ultra vires*, when made, it ought not to be regarded as validated by the 10th section of the Pharmacy Act (Ireland), 1875, Amendment Act, 1890 (53 & 54 Vict. c. 48). The regulation, in its present form was, it appears, made in 1883, but, with the exception of a slight variation introduced in 1893, by which a statutory declaration was substituted for a certificate, it also appears that the present regulation is the same as the corresponding regulation made in 1883. The main object of the Act of 1890 was to make provisions in relation to chemists and druggists; but the 10th section, after providing for the registration of druggists under that Act, proceeds to enact that every person who shall have served a four years' apprenticeship to a registered chemist and druggist, not being a pharmaceutical

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chemist, and who shall comply with the regulations of the Society in force for the time being, and in addition shall have served an assistantship of two years to either a pharmaceutical chemist or a licentiate of the Apothecaries' Hall, keeping open shop, shall be entitled to present himself for examination, under the principal Act, as a pharmaceutical chemist, and shall be entitled on passing his examination to be registered as a pharmaceutical chemist.

Now, if this was intended to adopt and validate Regulation III., which in my opinion, would, irrespective of this section, be clearly *ultra vires*, I take leave to say that a more embarrassing and objectionable mode of doing so could scarcely be devised. Legislation by reference is often sufficiently embarrassing and obscure, an evil which eminent Judges have called attention to: *e. g.* see *Knill* v. *Touse* (1); but, assuming the intention of the Legislature to have been to set up Regulation III., or to recognise it as valid, what could be a more obscure or embarrassing mode of doing so than to wrap up the intention in such words as those used in the 10th section, and reject the simple and clear course of either expressly referring to the regulation or expressly enacting its terms? One may well pause before attributing to the Legislature so needless and objectionable a mode of legislation.

I have said that this question was touched upon during the argument—it was so slightly argued that it can scarcely be said to have been more than touched upon. No authority whatever was cited on the question; no principle was referred to; and there was no close examination of the regulation, the Act of 1875, and the Act of 1890, to show that the 10th section had the suggested effect on the regulation; and, upon a question so serious, and involved in so much doubt and obscurity as I think this question as to the construction and effect of the 10th section is, I regard it as more desirable, under the circumstances, not to offer a judicial opinion upon it in this case, when, according to the view I take of the construction of the regulation, it is not necessary for my decision in the present case to do so; although, having regard to the distinct opinion I have formed as to the regulation being *ultra vires*, if the Act of 1875 only was to be considered, and as to the effect

(1) 24 Q. B. D. 195.

of *Lockwood's Case* (1), on the present case, I have thought it right to express and give briefly my reasons for that opinion.

I, therefore, now come to the construction of Regulation III., assuming, but not deciding, it to be valid. *Cleeland's Case* (2) has not, in my opinion, decided that the company we have to deal with in the present case, viz. the limited liability company of Hayes, Conyngham, and Robinson, does not, as at present constituted, comprise in the combination of its members, every one of whom is a registered pharmaceutical chemist, "a firm of legally qualified pharmaceutical chemists," within the meaning of these words in the regulation. It is said that the company, being incorporated, is, as a corporate body, a distinct entity from all its individual members taken together. That, however, does not in any way deprive its individual members of the character they possess of being without exception a body of legally qualified pharmaceutical chemists. But for the incorporation, the word "firm" would be applicable to them, as a number of persons carrying on business together. The corporate character of the company, of which they constitute the members, still leaves them a number of persons carrying on business together. It is said that a "firm" is a different thing from a corporate company. Assume that it is, and some firms of course are, yet that does not prevent a trading corporate company from comprising a "firm" in the collection of its members. Every firm is not an incorporated company, but it does not follow that a corporate company does not comprise a firm. The company in *Cleeland's Case* (2) had as members of it (and, in that case, a majority of its members) persons who were not pharmaceutical chemists; and in that respect it differed materially from the company in this case. I can see no purpose reasonably attributable to Regulation III., which is not served in the present case, in which all the members of the company are pharmaceutical chemists; and it appears to me to be not only a refinement, but an unnecessary and fallacious refinement, to say that they do not come within the description of "a firm" within the meaning of the regulation, although trading together, because they are in addition members of a cor-

(1) [1894] A. C. 347. (2) [1896] 2 Ir. R. 368.

Q. B. Div. 1898.

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Andrews, J.

porate company. I am wholly unable to adopt such a construction. The word "firm" (Latin *firmus*) properly describes what is compact or established. I think it is in this sense that the word came to be applied to and used as descriptive of a number of persons trading together. It is a secondary use of it where it is employed to signify the name, or style, under which they carry on their business; and there may be other secondary uses of the term; but I am not aware of any authority that decides that the members of a trading corporate company cannot collectively be called "a firm." The point in *Cleeland's Case* (1) was that the company then under consideration could not be regarded as "a firm *of legally qualified pharmaceutical chemists*," because all its members were not so qualified. It was not decided by that case that a corporate company, all of whose members were so qualified, could not be "a firm" within the meaning of the regulation; and I am unable to come to such a conclusion.

The result, therefore, according to my opinion, is that since, if the regulation in question is invalid the applicant William Boulton Conyngham is not bound by it, and if the regulation is valid his case comes within it, the writ of mandamus ought to go.

Solicitors for the applicant: *A. & J. Robinson.*
Solicitors for the respondents: *Casey & Clay.*

A. E. R. J.

(1) [1896] 2 Ir. R. 368.

BREW *v.* BREW (1).

Q. B. Div. 1898. Nov. 3, 4, 9.

Statute of Limitations—Part payment—Judgment—Levy of part of demand— Fi. fa.*—Co-debtors.*

Where a judgment was obtained in 1884 against A and B, and in 1886 part of the judgment debt was levied under an execution against A :—

Held, that this was sufficient to keep the debt alive against A and B for a further period of twelve years, and that within such period the judgment creditor was entitled to an order for liberty to issue execution against B.

APPLICATION on behalf of the plaintiff for liberty to issue execution against the defendant Francis Brew, junior, on foot of a judgment dated 1st May, 1884, more than twelve years before the present proceeding, for £248 9*s.* 11*d.* and interest thereon from 18th August, 1886, making in all £267 9*s.* 11*d.*, being the balance now due on foot of said judgment. It appeared from the affidavit of the plaintiff, Bridget Brew, that on 1st May, 1884, she obtained a judgment against Francis Brew, senior, and Francis Brew, junior, for £305 16*s.* 4*d.* On the 16th August, 1886, a seizure was made by the sheriff of county Clare of certain cattle of Francis Brew, senior, under a writ of *fi. fa.* issued on said judgment ; and said cattle having been sold a sum of £126 5*s.* 6*d.* was paid on foot of said judgment on the 18th August, 1886, less than twelve years before the service of notice of the present motion which was adjourned until now. On 17th September, 1886, said judgment was registered as a mortgage against certain lands to which Francis Brew, senior, was then entitled. Francis Brew, senior, died on the 13th November, 1892, and on his death Francis Brew, junior, became entitled to the said lands, and on the 18th March, 1893, said judgment was registered as a mortgage against the interest of Francis Brew, junior, who was in possession of said lands and had cattle thereon.

(1) Before JOHNSON, MURPHY, BOYD, and KENNY, JJ.

Q. B. Div. 1898.

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W. F. Kenny, in support of the application :—

The payment by the sheriff in 1886 is a part payment by one of the defendants, and being within twelve years takes the case out of the Statute of Limitations. The debt is a specialty debt, and a payment by a responsible person is sufficient. In simple contract debts the payment should be of such a character that a promise to pay the balance would be implied. It is otherwise in the case of a specialty debt. [He cited and referred to *Evans* v. *O'Donnell* (1); *Cronin* v. *Dennehy* (2); *Everett* v. *Robinson* (3); *In re Kingston's Estate* (4); *Corbett's Estate* (5); *Bailie* v. *Irwin* (6); *Allison* v. *Frisby* (7); *Chinnery* v. *Evans* (8); *Leahy* v. *De Moleyns* (9); *Wall* v. *Walsh* (10); *Conlan's Estate* (11); *Irish Land Commission* v. *Junkin* (12); *Irish Land Commission* v. *White* (13); 3 & 4 Wm. 4, c. 27, s. 40; Common Law Procedure Act, 1853, ss. 20, 23, 24; 37 & 38 Vict. c. 57, s. 8.]

Cullinan, contra, relied on *Green* v. *Humphreys* (14); *In re River Steamer Company, Mitchell's Claim* (15); *Tanner* v. *Smart* (16); *Morgan* v. *Rowlands* (17).

Cur. adv. vult.

Nov. 9.

JOHNSON, J. :—

This is a motion by Mrs. Brew for liberty to issue execution against Francis Brew the younger (surviving judgment debtor) on a judgment recovered by her 1st May, 1884 (more than twelve years before the present proceeding) against Francis Brew the elder (since deceased) and his son Francis Brew the younger on

(1) 18 L. R. Ir. 170.
(2) Ir. R. 3 C. L. 289.
(3) 28 L. J. (N. S.) Q. B. 24.
(4) Ir. R. 3 Eq. 485.
(5) 7 Ir. L. T. R. 68.
(6) [1897] 2 Ir. R. 614.
(7) 43 Ch. D. 106.
(8) 11 H. L. Cas. 115.
(9) [1896] 1 Ir. R. 206.
(10) Ir. R. 4 C. L. 103.
(11) 29 L. R. Ir. 199.
(12) 24 L. R. Ir. 40.
(13) [1896] 2 Ir. R. 410.
(14) 26 Ch. D. 474.
(15) L. R. 6 Ch. App. 822.
(16) 6 B. & Cr. 603.
(17) L. R. 7 Q. B. 493.

foot of promissory notes and money due for shop goods. For Francis Brew the younger it is contended that the plaintiff's claim is barred by the Statute of Limitations. On 16th August, 1886, the plaintiff issued execution on her judgment and lodged the *fi. fa.* with the sheriff of the county Clare by whom it was executed. Cattle of Francis Brew the elder were seized and sold by the sheriff, and £126 5*s.* 6*d.* realized by the execution was paid to the plaintiff on the 18th August, 1886, less than twelve years before the present proceedings. If that payment kept the judgment alive against Francis Brew the elder, it is conceded by counsel for Francis Brew the younger that it had the same virtue and effect against the defendant Francis Brew the younger. Francis Brew the elder died in November, 1892: in his lifetime the judgment was registered as a mortgage against his interest in the lands of Newtown, and on his death his son Francis Brew the younger entered into possession of these lands and has them stocked with cattle; the plaintiff has also registered her judgment as a mortgage against the interest of Francis Brew the younger in these lands. The question now to be judicially decided was propounded by Lord Westbury to counsel in the argument of *Chinnery* v. *Evans* (1):—"Suppose an action, and a judgment, and execution thereon, would payment by the sheriff be a payment within the statute?" (p. 125) *i.e.* the statute of 1833, sect. 40 (3 & 4 Wm. 4, c. 27) now altered by the statute of 1874, sects. 8 and 9 (37 & 38 Vict. c. 57), substituting twelve for twenty years. The solution of that question depends on the true construction of those statutable provisions. The Act of 1874, sect. 8, provides that no proceeding shall be brought to recover any sum of money secured (*inter alia*) by any judgment but within twelve years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for, or a release of, the same "unless" (following the words of the Act of 1833, sect. 40) "in the meantime some part of the principal money, or some interest thereon, shall have been paid or some acknowledgment of the right thereto shall have been given in writing signed by the person by whom the same shall be payable, or his agent, to the

(1) 11 H. L. Cas. 115.

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person entitled thereto, or his agent, and in such case no such proceeding shall be brought but within twelve years after such payment or acknowledgment." The statutes of 1833, sect. 40, and 1874, sect. 8, deal with two distinct matters in the saving clause, viz. "payment" or "acknowledgment." In the elaborate argument before us the defendant's counsel relied on *Morgan* v. *Rowlands* (1) to establish the proposition that the payment in 1886 by Francis Brew the elder of part of the judgment debt under compulsion of the execution was not such an acknowledgment as that a promise to pay the residue of the judgment debt could be inferred from it; but, as was pointed out during the argument of the present motion, that was an action on a simple contract, a promissory note: and the statutes then under consideration were the 28 Jac. 1, c. 16, s. 3, Eng. (10 Car. 1, sess 2, c. 6, Ir.) and Lord Tenterden's Act (9 Geo. 4, c. 14), while the matter now in hand is the construction of the words in the Acts of 1833, s. 40, and 1874, s. 8, and the question is whether or not the words in the saving clause of those sections, "by the person by whom the same shall be payable or his agent," apply both to the making of the payment, and also to the acknowledgment, or are limited to the acknowledgment; and further, what payment will satisfy the statutory requirement. In *Chinnery* v. *Evans* (2) Lord Westbury (p. 134) expresses his opinion that the word "by the person by whom the same shall be payable, or his agent" apply to the "payment" as well as to the "acknowledgment"; but Lord Cranworth (p. 138) in the same case says:—"It was argued that a payment to be brought within this statute" (3 & 4 Wm. 4, c. 27, s. 40) "must be a payment by the mortgagor, not by a receiver, who is an officer of the Court; but for this argument there is no warrant. The statute says nothing as to the person by whom the payment is to to be made": this was the opinion of the Master of the Rolls in Ireland in *Homan* v. *Andrews* (3), and of Jessel, M.R., and Brett, L.J., in *Harlock* v. *Ashberry* (4). In *In re Frisby* (5) a mortgagor and his surety covenanted for payment of principal

(1) L. R. 7 Q. B. 493.
(2) 11 H. L. Cas. 115.
(3) 1 Ir. Ch. R. 106, at p. 112.
(4) 19 Ch. D. 539, 545-548.
(5) 43 Ch. D. 106.

and interest on a specified day six months later: there was no covenant for payment of subsequent interest, but the mortgagor paid interest for several years after the specified day: the surety never paid either principal or interest, but it was held that the mortgagor's payment of interest prevented the statute of 1874, s. 8 (assuming it to apply to the case), from running in favour of the surety. Cotton, L.J., says (p. 116):—"The section says nothing about the person by whom the money is paid, and in my opinion it is satisfied if the payment is made by any one liable to pay." And, Fry, L.J., says (p. 117):—"The section does not say by whom the payment is to be made, so the case is within its terms. In my opinion, a payment satisfying the words of the section is made whenever there is a render of money to a person entitled to receive it by a person liable to pay it. I agree that payment by a stranger would not do, the money in that case not being paid in discharge of a liability of the person paying it." In *Lewin* v. *Wilson* (1) the judgment of the Privy Council, after referring to *Chinnery* v. *Evans* (2) and *Harlock* v. *Ashberry* (3) proceeds:—"Their Lordships have not been referred to any case where it has been decided that payment by some person concerned to answer the debt has been held to be insufficient to keep a right alive against the party charged in the suit merely because he was not that party or his agent" (p. 644). "It is remarkable that when the Legislature speaks of payment alone it does not use any qualifying words." Taking then the construction of "payment" in the Act of 1874, sect. 8, to be that expressed by these eminent Judges, differing from Lord Westbury, the practical question to be decided in the present instance is, was the payment of £126 to the plaintiff under the execution on her judgment a payment which prevents the bar of the statute?

In my opinion, the answer to this question is in principle to be found in the decision in *Chinnery* v. *Evans* (2), which covers the present case. The payment there was made under the order of the Court, by a receiver appointed under the Mortgage Act (11 & 12 Geo. 3, c. 10), which was passed to give mortgagees a summary remedy for recovering interest on their mortgages; and Lord

(1) 11 App. Cas. 639. (2) 11 H. L. Cas. 115. (3) 19 Ch. D. 539.

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Westbury, on his construction of section 40 of the Act of 1833, that the "payment" must be "by the person by whom the same shall be payable or his agent" says, "No reasonable doubt can be entertained that under the statute the receiver in receipt of the rents is, in point of fact as well as of law, the receiver of the mortgagor, the owner of the estate subject to the mortgage, and that any payment made by the receiver in pursuance of the order is payment in law by the legal agent of the person liable to pay." Lord Cranworth (p. 134), on the other construction of section 40 of the Act of 1833, that it says nothing as to the person by whom the payment is to be made, after pointing out that payments by a stranger would not be payment at all, but would be gifts made from time to time by the stranger, which could not with accuracy be called payments, says, "but the payments in this case were not payments by a stranger, for though a receiver appointed under the Irish Act, 11 & 12 Geo. 3, c. 10, is an officer of the Court, yet he is certainly no stranger to the mortgagor, but a person paying for him, and on his account, what he is bound to pay" (p. 139). *Kelly* v. *O'Brien* (1) and *Lane* v. *Lynch* (2), had settled, in Ireland, that the receiver under the Mortgage Act is appointed for the mortgagee to receive for him particularly, the rents of the mortgagor's property; and the House of Lords decided in *Chinnery* v. *Evans* (3), that the receiver's payment of these rents by order of the Court to the mortgagee on whose petition he was appointed, was payment within the statute. It is not suggested that the office of sheriff executing a writ of the Common Law Courts is precisely analogous to the duty of a receiver appointed under the Mortgage Act. But in executing a writ issued on a judgment the sheriff is the officer of the Court. Resistance to the sheriff in the execution may be a contempt of the Court on which the judgment is recovered on which the writ issues (4). The *fi. fa.* lodged by the plaintiff with the sheriff for execution and levy commands the sheriff, of the chattels of the defendant in his bailiwick, to cause to be made the sum in the writ, and to have the money before the Court, immediately after the execution of the writ, to be paid to the plaintiff in pursuance of

(1) Hayes & Jo. 377.
(2) 9 Ir. Eq. R. 501.
(3) 11 H. L. Cas. 115.
(4) *Cooper* v. *Asprey*, 3 B. & S. 932.

the judgment. Whether it is by the agency of a receiver or sheriff the payment is made to the creditor on foot of the debt which the debtor is bound in law to pay, and out of the debtor's rents or chattels, as the case may be, for the debtor and on his account: to the extent of such payment, the debtor is discharged from so much of the judgment debt. I therefore think that such payments by a sheriff are not payments by a stranger to the judgment debtor, but are payments out of the debtor's chattels "by a person paying for him and on his account what he is bound to pay" (1). In *Cronin* v. *Dennehy* (2), a payment by the Landed Estates Court was held to prevent the bar of the statute. For these reasons I am of opinion that this motion ought to be granted.

MURPHY and BOYD, JJ., concurred.

KENNY, J.:—

This is an application for leave to issue execution on a judgment of 1884, which was obtained against two defendants. One of them, Francis Brew, sen., has died, and the motion is directed against Francis Brew, jun., the surviving defendant. It is admitted that the latter has never made any payment or given any acknowledgment which would save the judgment debt from the operation of the Statute of Limitations. It appears, however, that within twelve years a writ of *fi. fa.* under the judgment was executed against the goods of Francis Brew, sen., and a considerable sum levied thereunder by the sheriff, and paid over by him to the plaintiff; and the plaintiff contends that the receipt of this sum amounted to a payment which would prevent the statute being a bar in favour of Francis Brew, sen.; and if so, that the statute was thereby also prevented from running in favour of the surviving defendant.

In the course of the argument it was admitted by defendant's

(1) Lord Cranworth in *Chinnery* v. *Evans*, 11 H. L. Cas. 139.
(2) Ir. R. 3 C. L. 289.

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counsel that if the receipt of the amount of the levy has had the effect of keeping the judgment debt alive as against the deceased defendant, it would have a like effect as regards the surviving defendant. This could scarcely be disputed: *Bailie* v. *Irwin* (1); and the only question for our consideration now is whether what may be regarded as a compulsory payment under a levy by the sheriff, pursuant to the judgment, is a "payment" within the saving words of the statute so as to prevent the latter from being a bar.

The statute applicable to the case is the Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), sect. 8, which in terms is identical with the previous Act of 3 & 4 Wm. 4, c. 27, sect. 40, with the exception that a twelve years period of limitation is substituted for the twenty years provided by the latter Act. Both sections, while referring to "payment" and "acknowledgment" in "writing" in the same sentence, use the word "*payment*" nakedly, and without any qualification as to the person by whom such "payment" is to be made. In marked contrast to this general provision for "payment" is the saving for "*acknowledgment*," which must be "given in writing, signed by the person by whom the same shall be payable, or his agent." This difference is the more remarkable when it is remembered that, though the Statute of Limitations, 21 Jac. 1, ch. 16, Eng. (10 Car. 1, sess. 2, ch. 6, Ir.) contained no saving clause, the Courts held that a "part payment" would avoid the effect of the statute, provided there was nothing in the circumstances under which the payment took place which would rebut the implication of a promise to pay the remainder of the debt. The part payment was regarded as an acknowledgment of the existence of the debt from which the law implied a promise to pay. The Common Law Procedure Amendment Act (Ireland), 1853, sect. 23, favoured such a construction by referring to "acknowledgments in writing by the party liable, or his agent, or by part payment."

This difference between the Acts of James I. (with the decisions as to part payment) and of 1853, on the one hand, and those of 2 & 3 Wm. 4, and 37 & 38 Vict. on the other, have been relied

(1) [1897] 2 Ir. R. 614.

on in support of the present motion as indicating that part payments, which might not be sufficient to take a case out of the statute under the former Acts, might be held to be sufficient under the latter. Similar arguments were addressed to the Court in *Cronin* v. *Dennehy* (1), and *Lewin* v. *Wilson* (2); and in the latter case at least seem to have met with favourable recognition from Lord Hobhouse, who delivered the judgment of a Committee of the Privy Council, of which Lord Watson was a member. It had been held by the Court of Appeal in *Harlock* v. *Ashberry* (3), that the principle that underlay all the Statutes of Limitations is that payment must be an admission of right, and that it must be made by a person bound, or at least entitled, to pay; and Lord Hobhouse, in commenting on that case, in *Lewin* v. *Wilson* (2), when he dealt with "payment" in a section of a Colonial Statute, equivalent to the 8th section of the Act of 1874, says that a "wider range of exposition is allowed, and has been taken" than was allowable in construing an "acknowledgment," and that "their Lordships had not been referred to any case where it has been decided that payment made by some person concerned to answer the debt, has been held to be insufficient to keep a right alive against the party charged in the suit, merely because he was not that party or his agent. . . . As regards the recipient, so long as he is paid according to the intention of the contracting parties, he is in full enjoyment of his bargain, and is not put upon any further assertion of his rights; but not so if he only receives acknowledgment."

In accordance with this wider interpretation of "part payment," it has been settled by numerous cases that a part payment by a receiver appointed at the instance of a mortgagee, or by the Landed Estates Court, is sufficient to take a case out of the statute (*Chinnery* v. *Evans* (4); *Cronin* v. *Dennehy* (1)), and that payment by one of two conusors of a judgment, or by one of two covenanters in a mortgage, will keep the debt alive against the other (*Corbett's Estate* (5); *Bailie* v. *Irwin* (6)). It will be seen that in *Chinnery* v.

(1) Ir. R. 3 C. L. 289.
(2) 11 App. Cas. 639.
(3) 19 Ch. D. 539.
(4) 11 H. L. Cas. 115.
(5) 7 Ir. L. T. R. 68.
(6) [1897] 2 Ir. R. 614.

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Evans (1), and *Cronin* v. *Dennehy* (2), the very case is put interrogatively in argument as to whether receipt of the amount of a sheriff's levy, such as in the present case, would not constitute a "part payment" within the Act, and the suggestion met with no expression of dissent from the Court; while in *Corbett's Estate* (3), the late Judge Flanagan—if the report of his judgment be a correct one—expressed the clear opinion that such a "part payment" was within the saving clause of the statute of Wm. 4.

The present motion is resisted on the authority of *Morgan* v. *Rowlands* (4). The action was on a promissory note, and consequently the Statute of Limitations that applied was the 21 Jac. 1, c. 16. The plaintiff had, within six years before action, sued the defendants in the County Court for interest on the note. The defendants had defended that suit. Judgment was recovered, and the defendants thereupon paid the amount recovered into Court. It was held by Blackburn and Hannen, JJ., that as the defendants had resisted payment of the interest to the last, and as they had paid it only in obedience to the judgment, it was impossible to say that from such a payment any promise to pay the principal could be in fact inferred, and consequently that the right to recover the latter was barred. Blackburn, J., adds: "If there were any ground for saying that a promise in *law* was sufficient, the result might be different; but I think a promise in *fact* is clearly necessary."

It will be observed that this case is a decision on the Act of James 1, and not on that of Wm. 4—and that there were circumstances to expressly negative an acknowledgment that the principal sum was due. But notwithstanding the high authority of Lord Blackburn, Cotton, L.J., in the Court of Appeal, in *Green* v. *Humphreys* (5), apparently found a difficulty in assenting to the whole of Lord Blackburn's proposition, and refused to decide that the acknowledgment must be such that a promise may be inferred in *fact*, and not merely implied in law.

I therefore am of opinion that *Morgan* v. *Rowlands* (4) is not an

(1) 11 H. L. Cas. 115.
(2) Ir. R. 3 C. L. 289.
(3) 7 Ir. L. T. R. 614.
(4) L. R. 7 Q. B. 493.
(5) 26 Ch. D. at p. 478.

authority for a refusal of this application. I consider that there has been a "part payment" of principal within the 8th section of the Act of 1874, and that the plaintiff is now entitled to issue execution against the surviving defendant.

Solicitor for the plaintiff: *T. Kelly.*
Solicitor for the defendant: *E. J. O'Meehan.*

J. P. B.

Land Com. 1898.

April 30. June 17.

Appeal. Nov. 9, 10, 29.

GLOSTER, Landlord; RYAN, Tenant (1).

Landlord and tenant—Land Acts, 1881, 1887—*Villa residence—Non-agricultural holding—Two dwelling-houses on a holding—Separation of holding—Land Law Act*, 1896, *sect. 5, sub-sect.* 2.

By lease dated the 16th August, 1859, G. demised to D. for three lives a holding comprising 123 acres statute, subject to the rent of £199 4*s.* 10*d.* There were two houses on the holding, which was situate about 3 or 4 miles from Limerick. On the 4th March, 1871, D. demised to S., a merchant in Limerick, one of the houses, Willow Bank, with a garden and curtilage, comprising two acres, which was occupied as a residence. On the 28th January, 1881, S. made a sub-lease of Willow Bank to P., who expended £1600 on the building, prior to the passing of the Land Law Act, 1881, and made it a handsome villa residence.

On the application of R., who was assignee of the interest of D., a Sub-Commission fixed a fair rent.

Held by the Land Commission, that the letting comprising Willow Bank and the two acres could not be separated from the rest of the holding without diminishing the value of the landlord's interest, and that as the holding comprised a handsome villa residence, the originating notice should be dismissed:—

Held by the Court of Appeal:—(1) that the holding could not be separated without injury to the rest; but (2) (reversing the decision of the Land Commission), that a fair rent should be fixed for the whole.

The lands in this case were situated about four miles from the city of Limerick, and comprised nearly 123 acres statute measure, on which there were two dwelling-houses. The lands were let by lease, dated the 16th August, 1859, from Edward Gloster to Alexander Duffield, for three lives, of whom one was the Prince of Wales, and were demised in three separate divisions:—1. That part of the lands of Clonlara, otherwise Kilmurray (now called Rose Lawn), containing 60A. 3R. 39P. statute measure then in the possession of Duffield; 2. That part of the lands of Kilmurray, otherwise Clonlara, containing 22 acres plantation measure, then also in Duffield's possession; 3. That part of the said lands now called Willow Bank, containing 16 acres plantation measure, with

(1) Before Meredith, J., and the Hon. Gerald FitzGerald, Q.C., Commr.

the dwelling-house and offices thereon. The rent reserved was £199 4*s.* 10*d.*; and there was a covenant by the lessee to maintain and keep in repair the premises, and the trees and plantations; a covenant not to cut down any trees without the consent of the landlord in writing; a covenant that he would not assign or sublet without the consent of the landlord in writing, except in one division to one person; a covenant against letting in conacre: and a covenant that only two dwelling-houses, with the porter's lodge, should be erected thereon; and there was a proviso that on breach of any of the covenants the lessor might re-enter.

The history of these three denominations of land, until they all became comprised in the one lease, was this:—Willow Bank, the third lot in the lease, consisting of a dwelling-house with offices, a gate-lodge, and sixteen acres of land, were originally held by the representatives of Samuel Young; it was then taken by Captain Hickey, who resided there, until Duffield took it. The second lot, consisting of 22 acres, was agricultural or pastoral. The other division, the first in the lease, Rose Lawn, had a good dwelling-house on it, and the occupants of Rose Lawn down to 1852, were the representatives of John Young, Sir R. Franklin, and his widow; M'Kerin, a merchant; Looney and Dartnell, solicitors; Cochrane, a merchant; and Sir William Hamilton, a retired officer in the army.

Duffield was a partner of the firm of Shaw & Duffield, provision merchants in Limerick. He afterwards got into difficulties, sublet Willow Bank, with the landlord's consent, with a garden, and curtilage of about two acres fronting the Shannon.

By lease of the 4th March, 1871, Willow Bank, with two statute acres and the gate-house, were let to Shaw, a Limerick merchant, as a residence, at the rent of £42 10*s.* Shaw sublet Willow Bank to Phelps for twenty-one years, at a rent of £100, and Phelps expended over £1600 upon the house of Willow Bank, and changed it into a handsome villa residence. There was no approach to Willow Bank or the two acres of land let along with it, except across a part of the original sixteen acres, which had not been let with the house.

The interest of Duffield, under the lease of 1859, was assigned to Ryan, who served a notice to fix a fair rent of the entire,

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therein described as containing 122A. 2R. 16P.; and the Sub-Commission fixed the fair rent at £150. From that order both landlord and tenant appealed to the Land Commission.

Cherry, Q.C., and *Jefferson*, for the landlord, cited *Grace* v. *Eyre*, as referred to in *Ward* v. *Corballis* (1); *Moonan* v. *Conyngham* (2).

Wakely, for the tenant, cited *Wallace* v. *Boggs* (3); *Spring* v. *Blennerhasset* as referred to in *Moonan* v. *Conyngham* (4).

June 17.

MEREDITH, J.:—

The lease before the Court, which was made on the 16th August, 1859, by Edward Gloster to Alexander Duffield, comprises in reality two holdings, one Clonlara, otherwise Kilmurray, now called Willow Bank; the other, Rose Lawn. Willow Bank is described as containing 16 acres plantation measure, or thereabouts, with the dwelling-house and offices thereon, as theretofore occupied by Captain Hickey. The map upon the lease is suggestive: the holding is bounded by the river Shannon, and Willow Bank is in truth and fact a charming villa residence on the banks of the Shannon. On the Rose Lawn holding there is a substantial dwelling-house, formerly occupied by Lady Franklin, and afterwards by two solicitors in succession, which, if it was in good repair, could be let at a substantial rent as a residence in itself. Still it may be considered not unsuitable for the requirements of a tenant desiring to reside upon and work the Rose Lawn holding as a farm. There is only one avenue, for a certain distance at all events, from the road, common to the two places, Willow Bank and Rose Lawn, and in that circumstance, which appears from the map on the original lease, lies I think one of the greatest difficulties in the case. The Willow Bank holding has been dealt with since the lease of 1859 in this way: on the 4th March, 1871, Duffield, who was the lessee in the lease of 1859, demised to Mr. Alexander William Shaw, the well-known merchant of Limerick, "that dwelling-house,

(1) [1894] 2 I. R. 637.
(2) [1895] 2 I. R. 1.
(3) 27 Ir. L. T. R. 105.
(4) [1895] 2 I. R. 17.

offices, garden and pleasure-grounds as now in his possession, known at present by the name of Willow Bank, also the gatehouse in the avenue leading to Willow Bank," situate in the parish of Kilmurray. Mr. Shaw resided there for sometime, but on the 28th January, 1881, he made a sub-lease to Mr. Joseph James Phelps, who appears to have been a gentleman of very considerable wealth. That is a sub-demise "of the dwelling-house, offices, garden and pleasure ground, as now in his possession, known at present by the name of Willow Bank," for a term of twenty-one years, at the rent of £100 a-year. Now according to the evidence of Major Gubbins, Mr. Phelps laid out £3000 in improving Willow Bank, and the builder's account alone came to £1545 13*s.* 9*d.* This latter sum was vouched by Mr. Hayes, who deposed to receiving the cash. And the important part of the matter is, I think, that the expenditure was incurred prior to the passing of the Act of 1881. In other words, upon this holding when the Land Act of 1881 was passed, you had Willow Bank, which had been a residence with 16 acres of land attached, converted into an elaborate villa residence with a garden and pleasure ground comprising 2 acres, held at a rent of £100 a-year, and upon which the large expenditure, already referred to, had been made. To say that we could fix a fair rent in respect of this villa residence would be to introduce a new provision into the Acts of 1881 and 1896. The tenant came into Court, seeking to have a fair rent fixed for the entire holding, villa residence and all. But Mr. Wakely, who represented the tenant (though it was with difficulty, I think he found his way to go so far), ultimately advanced an alternative argument. If (he argued), the Court decide that they cannot fix a fair rent upon the holding with Willow Bank included, they can and should apply the provisions of sect. 5, sub-sect. 2, of the Act of 1896, and separate the premises comprised in the demise to Phelps from the rest of the holding and fix a fair rent in respect of the residue of the holding. Mr. Cherry, on the other hand, contended that if there was to be a separation at all it should be a separation of Willow Bank, as described in the lease of 1859, with 16 acres Irish plantation measure attached, but Mr. Wakely's client would not consent to this and elected to stand or fall by Mr. Wakely's contention.

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Meredith, J.

Now if the Willow Bank of to-day, with its 2 acres, the villa holding, adjoined the road, if there was a separate avenue or other means of access to it, or if we were satisfied that we had power or authority or jurisdiction to carve up the holding in such a way as to give an avenue or access to Willow Bank independent of and unconnected with the rest of the holding, I think the argument of Mr. Wakely would certainly be entitled to attention, but it seems to us that the only right of way that Mr. Phelps has into Willow Bank is a way arising under the leases made by Duffield to Shaw, and Shaw to Phelps, and that as between Captain Gloster, the landlord of the holding before the Court, and Patrick Ryan the tenant, we cannot hold that any such right of way exists or that we have power to grant one. In other words, I do not think that there is a right of way *quoad* the property in the lease of 1859, and in consequence I cannot say that there is a distinct and substantive part of the property comprised in the demise which can be separated from the rest of the property, without diminishing the value of the landlord's interest therein. I do not think we can or ought to divide holdings under sub-sect. 2, of section 5, of the Act of 1896, unless it is perfectly clear that the part, which is ultimately to become the landlord's part, is really and truly a separate entity, a separate holding, which the landlord, when the lease or letting expires can utilise without law suits or such disadvantages or unpleasantnesses as generally follow from a common right of way. I do not think we have any power to grant a right of way. I do not see how we can grant a right of way which was not in existence at the time of the demise and which has never been granted by the tenant to his landlord. If the parties could have made an arrangement (as we suggested), we should have been greatly pleased to give effect to it. But each party has elected to abide by his strict legal rights, and the question is first of all, can we fix a fair rent in respect of the entire holding? That is absolutely impossible, comprising, as it does, this villa residence, which is, at least, value for £100 per annum. Can we separate the property into two parts without diminishing the value of the landlord's interest in the property? I think we certainly cannot under the existing circumstances of the case; therefore, we have no option except to say that we are unable to admit the tenant,

either in whole or in part, to the benefit of the 5th section, and the originating notice must be consequently dismissed.

J. MAC M.

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From that order the tenant appealed (1).

Appeal. Nov. 9, 10, 29.

The Solicitor-General (*Barton, Q.C.*), and *T. M. Healy*, for the appellant:—

A sub-tenant cannot, by improving a house which is sublet to him, alter the whole holding so as to take it out of the Act: *Magner* v. *Harris* (2). The erection of a dwelling-house in excess of the requirements of the holding does not prevent a fair rent being fixed: *O'Donnell* v. *Chearnley* (3). That is contemplated by sect. 7, sub-sect. 1 of the Act of 1896. There are only four cases in which a holding was excluded from the previous Acts because it comprised some subject-matter besides agricultural land: *Leonard* v. *St. Leger Barry* (4), which was a case of demesne land; *Bradley* v. *Johnston* (5), which was a demise of a village and a farm situated at some distance apart, with a bulk rent issuing out of both; *Boyle* v. *Foster* (6), a case of a mill; and *Smyth* v. *Douglas* (7).

It is true that there are only two acres let along with Willow Bank; but when more than 100 acres are added to the holding, the smallness of the land sublet with the house ceases to be an element for consideration: *Wallace* v. *Boggs* (8); *Wall* v. *Eyre* (9).

In these cases, where there are different classes of property in the holding, the Court has jurisdiction: (1) to fix a fair rent; (2) to separate the two; (3) or to dismiss the originating notice. Where a second kind of property is introduced, the Court must consider whether: (1) there is an addition of a repugnant character; or (2) is it, on the contrary, an advantageous excrescence?

(1) In the Court of Appeal before FITZGIBBON, WALKER, and HOLMES, L.JJ.
(2) Greer's Suppl. Rep. 64.
(3) 32 L. R. Ir. 185.
(4) M'Dev. 240.
(5) 30 L. R. Ir. 632.
(6) 30 L. R. Ir. 623.
(7) Unreported.
(8) 27 Ir. L. T. R. 105.
(9) 32 L. R. Ir. 475.

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The value of the houses at the date of the lease does not seem to have had much effect on the rent. The Poor Law valuation of the whole was £142, of which £118 5*s.* was on the lands; £12 on Willow Bank; £12 on Rose Lawn. In 1898 the Poor Law valuation of the lands is £118 5*s.*; of Willow Bank, £37; of Rose Lawn, £9; and £3 on the Lodge.

Cherry, Q.C. (with him *Jefferson*), for the landlord, *contra*:—

This case may be treated in either of two ways: (1) as a *homogeneous* holding, the main character of which is residential; or (2) as a *heterogeneous* holding, consisting partly of a non-agricultural element, viz. the house known as Willow Bank, and the land let with it; and partly of an agricultural element, viz. Rose Lawn House and the rest of the land.

(1) Treating the holding as being *homogeneous* (though we contend that this is not the correct view to take), the case comes within sub-sect. 1 of the 5th section of the Land Act, 1896 (59 & Vict. c. 47). The true test as to whether a holding is excluded from the Land Acts as residential is which element predominates, the agricultural or the residential? Both houses on this holding have been always occupied by gentlemen of means and position. One (Willow Bank) is now sublet for £100 a-year. An offer of £45 a-year is proved to have been recently made for Rose Lawn. The land is not valued by anyone at more than £130 a-year. The holding therefore is "substantially" residential. The actual letting value, not the Poor Law valuation, should be taken as the test of value.

But (2) the holding in this case cannot be treated as *homogeneous*. It was originally let in three divisions, and of these Willow Bank House, and the 16 Irish acres let with it, were clearly a residential holding. "A distinct and substantive part of the property" is therefore non-agricultural, and the case comes within sub-sect. 2 of the 5th section of the Land Act, 1896.

Prior to the passing of that Act, it was always held that where part of a holding was of a non-agricultural character, the whole was excluded: *Boyle* v. *Foster* (1); *Bradley* v. *Johnston* (2). And

(1) 30 L. R. Ir. 623. (2) 30 L. R. Ir. 632.

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as this was a question of jurisdiction, it did not matter how insignificant relatively the *non-agricultural* element was: *Grace* v. *Eyre* (1).

Section 7 of the Land Act, 1896, cannot help the tenant. It deals only with the question of subletting, not with the character of the holding; and here the character of part of the holding is, and always was, residential.

The only right the tenant can claim is to a subdivision of the holding under sub-sect. 2 of sect. 5 of the Land Act, 1896. But this would "diminish the value of the landlord's interest"—*Norton* v. *M'Donnell* (2)—unless either the 16 acres originally let with Willow Bank is partitioned off along with it, or at least the avenue leading to the house is secured to the landlord. The landlord will have no objection to a partition in that case.

In any event the landlord is entitled to a rent upon Willow Bank House, which was not built or improved by the tenant, or by his predecessor in title. It was built by the landlord, and improved by a sub-tenant. A tenant is not entitled to exemption from rent in respect of improvements made by his sub-tenant. If the sub-tenant were entitled to have a fair rent fixed, the allowance might, as it were, be passed on from the middleman to the head-landlord, but in this case the sub-tenant never could get a fair rent fixed, and never could claim compensation for improvements. Why, then, should the tenant get any allowance in respect of what he has not paid? and can never be asked to pay?

FITZ GIBBON, L.J.:—

Nov. 29.

This is an appeal from an Order of the Land Commission of June 17, 1898, dismissing the tenant's originating notice to fix a fair rent upon the following grounds, as stated in the Order:—"The Court being of opinion that a distinct and substantive part of the property held under the lease of August 16th, 1859" (the subsisting lease of the holding in question) "is not agricultural or pastoral in its character, and that the separation of the property held under the said lease into two parts would, apart from the

(1) Unreported, but referred to in *Ward* v. *Corballis*, [1894] 2 I. R. at p. 615.
(2) [1899] 2 I. R. 51.

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fixing of a fair rent, diminish the value of the landlord's interest therein." The holding is four miles from Limerick, on the banks of the Shannon; it contains 75 acres, plantation measure, equal to 123 statute acres, has two dwelling-houses on it, known as Willow Bank and Rose Lawn, and is held under lease at a rent of £199 4*s.* 10*d.* The valuation is £168 5*s.* A sub-Commission had fixed a fair rent of £150. Both landlord and tenant had required the case to be re-heard: the tenant upon the ground that the rent fixed was too high; and the landlord upon three grounds—(1) that the main object of the letting was residential, and so excluded from the Act; or (2), in the alternative, that inasmuch as a distinct and substantive part of the property held under the lease, viz. the villa residence of Willow Bank, was not agricultural or pastoral in its character, and was not the substantial part of such property, the Court should direct that the said villa residence of Willow Bank should be treated as a separate holding, and should be held at such rent, during the continuance of the tenancy, as the Court might determine to be the proper proportion of the rent reserved by the demise; and (3), as a further alternative, that the rent ought to be increased, as the addition for buildings was insufficient, and the allowance to the tenant for buildings was excessive, and that the rent assessed on the lands was too low.

The Land Commission did not adopt any one of the alternatives stated in the landlord's notice. They did not hold that the main object of the letting was "residential"; and though they did hold that part, viz. Willow Bank, was not agricultural or pastoral, they did not separate that part, and fix a fair rent on the remainder, but they dismissed the originating notice, because, in the words of Meredith, J., "the tenant, seeking to have a fair rent fixed for the entire holding, villa residence and all," was not entitled to that relief, and the Land Commission could not separate the property into two parts without diminishing the value of the landlord's interest, and "therefore" was "unable to admit the tenant, either in whole or in part, to the benefit of the Act of 1896, sect. 5, and the originating notice must consequently be dismissed."

Mr. Healy contended that the Land Commission could not thus go beyond the landlord's notice of rehearing. But as the

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ground of dismissal was a supposed absence of jurisdiction either to fix a fair rent, or to divide the holding, we think that this preliminary objection cannot be sustained; or, at least, that we ought not to decide the case upon what is, at best, a point of pleading.

A full statement of the circumstances of the holding is necessary to explain the questions at issue, some of which have now arisen for the first time. The existing lease of the holding, dated August 16, 1859, from Edward Gloster, a colonel residing in London, to Alexander Duffield of "Willow Bank, Limerick, Esquire," comprises three distinct parcels described as follows:—(1), "That part of the lands of Clonlara (now called Rose Lawn) containing 37A. 2R. 25P. plantation measure, as formerly in the possession of the representatives of John Young, deceased, and now in the occupation of the said Alexander Duffield." (2), "That part of the lands of Clonlara containing 22 acres plantation measure, as formerly in the possession of Mrs. Nolan and Rev. William Maunsell, and now in the actual possession of said Alexander Duffield"; and (3), "Also that part of said lands now called Willow Bank, containing 16 acres plantation measure, with the dwelling-house and offices thereon, as heretofore occupied by Captain Hickey."

The lease is in consideration of "the surrender of a former lease of part of the premises, dated November 30, 1850," from Gloster to Duffield, which comprised Willow Bank, and also of the surrender of an "agreement respecting other parts of said premises, dated May 22, 1852," which comprised Rose Lawn; but I understand that it appears from the surrendered lease and agreement that the 22 acre lot was not included in them, though Duffield was described as in occupation of it in the lease of 1859.

So far as the previous character and history of the three lots are in evidence, Willow Bank was held by the representatives of one Samuel Young, until it was taken by Captain Hickey who resided there until Duffield took it in 1850. It consisted of a good dwelling-house with offices and a gate-lodge, and 16 acres of land, and there is a preponderance of evidence that Willow Bank, taken by itself, was separately occupied, and was "residential" in character, down to the lease of 1859.

The 22 acre lot, on the other hand, was wholly agricultural

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or pastoral land, and, separately considered, it is so still; we know nothing more about the tenants of it than what appears in the lease. The remaining lot, Rose Lawn, comprising 37A. 2R. 25P. plantation measure, had upon it a good dwelling-house and offices suitable for the residence of a gentleman, but not too good for a resident tenant farming the land attached; at the date of the lease the dwelling-houses on Willow Bank and on Rose Lawn seem to have been very similar, good houses but nothing more. The successive occupiers of Rose Lawn down to 1852, when Duffield became tenant, were the representatives of John Young, Sir Richard Franklin and his widow, M'Kerin, a wine merchant, Looney and Dartnell, solicitors, Cochrane, a merchant, and Sir William Hamilton, a retired officer in the army. Having regard to the position of the occupiers, there is some evidence that might give a residential character to Rose Lawn up to 1859, if regarded by itself; but the quantity of land, and the absence of any evidence of a residential rent, would have made this difficult, and the difficulty would be increased by the surrendered letting of 1852. At the date of the lease Duffield, the lessee, was a partner in the firm of Shaw & Duffield, bakers and provision merchants of Limerick, and was, apparently, a man of independent means, not merely a farmer. The first question to be determined, in our opinion, is whether the entire holding acquired a single or uniform character by the lease of 1859, and, if so, whether that character was residential, or was agricultural and pastoral. Upon this question the contract of tenancy must be first considered, and if it supplies an answer it cannot be contradicted. If there is doubt on the contract, we may look further to user, and to collateral evidence. It is a lease for three lives; Rose Lawn and the 22 acres are described as so much land, without any mention of buildings; in describing Willow Bank, the lands are first mentioned, and the dwelling-house and offices are only referred to as going with them; the total area is over 75 plantation acres; the rent is a bulk rent of £199 4*s.* 10*d.*, only 12½ per cent. over the present tenement valuation; the covenant to repair mentions fences, drains, ditches, hedges, bounds, timber, trees, plantations, and improvements, and does not mention buildings; there is a covenant not to underlet, cottier out, or assign, without the landlord's

written consent, "*except in one division to one person*," and not to conacre, "it being the meaning hereof that said premises or any part thereof shall not be cottiered out, and that *only two dwelling-houses*, with the porter's lodge, shall be erected thereon, save a house or houses as residences for the caretaker, *or steward*, on said lands, or other the workmen actually employed"; and there is a condition of re-entry for breach of the covenant against underletting, assigning, or conacreing, or for permitting any spoil or waste. It seems impossible to doubt that this lease amalgamates the three lots into a single uniform holding, and it contains nothing which could discharge the burden, which lies on the landlord, of proving that the main object of the letting was for a residence. Except so far as the existence of two dwelling-houses, with a porter's lodge, upon the holding, could indicate the contrary, its character upon the lease was agricultural and pastoral. It was 75 Irish acres of land, with two dwelling-houses upon it, not two dwelling-houses with 75 acres of land attached to them, and all the land was to be kept together in the hands of "one person." The user has been entirely consistent with the idea that the land was the principal subject-matter, and that the whole place was a farm. Duffield farmed all the land, except two acres, until he died. At first he lived in Willow Bank, and a consent to sublet Rose Lawn was endorsed on the lease, but was not acted on. He got into difficulties, removed to Rose Lawn, and resided there until he died. With the landlord's consent he sublet Willow Bank, not with the 16 acres which were originally attached to it, but only with a garden and curtilage of about two statute acres in all, fronting the Shannon, keeping all the rest together as a farm with one dwelling-house upon it for the tenant.

On March 4, 1871, Willow Bank, consisting of the dwelling-house, two statute acres, and gate-house, were let to Shaw, a Limerick merchant, as a residence, at a rent of £42 10*s*. This under-lease is still subsisting, and the appellant is in receipt of the rent reserved by it.

On January 28, 1881, Shaw sublet Willow Bank to Phelps for 21 years, at a rent of £100. Shaw had spent some money on it, but this rent of £100 was undertaken before Phelps improved the place. Mr. Phelps expended a large sum, paying £1545 13*s*. 9*d*.

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to a builder, and £70 for painting, upon the Willow Bank house, making it what it is now—in the words of Meredith, J., "a charming villa residence on the banks of the Shannon." It is still occupied by relatives of Mr. Phelps, who are stated to be still paying the £100 rent for it.

Fitz Gibbon, L.J.

We concur with Meredith, J., in thinking it impossible to separate Willow Bank from the rest of the holding. Such a separation would diminish the value of the landlord's interest, and, besides, the title makes separation impossible. There is no approach to Willow Bank and the two acres, except across a part of the original sixteen acres, which has not been let with the house, and, the sixteen acres could not now be treated as a separate holding, because they are not so in fact, and such a separation would violate the contract of tenancy. The Act of 1896, sect. 5, therefore, cannot be applied to the case. But we differ from Meredith, J., as to the result of this state of facts.

The result, in our opinion, is not that the entire holding is excluded from the Land Acts, nor to deprive the entire leasehold of its agricultural and pastoral character, but only to show that it is still a farm which has the special incident, or circumstance, of having upon it a second dwelling-house, which the tenant has been permitted to sublet, for which he is now receiving £42 10*s.* per annum, with some prospect of an increase when the sub-lease falls in, and the letting value of which, as a residence, should be taken into account in fixing the fair rent of the whole.

After Duffield's death his nephew continued to occupy all the rest of the holding, and to use it as a farm, until he sold it to the present tenant Ryan, the appellant, to whom the lease of 1859, subject to the under-lease of Willow Bank, was conveyed in 1893 for £735. He is a farmer and nothing else. He lives on a farm of 160 Irish acres, 1½ miles from Rose Lawn, and he sold a farm at Cappawhite, fourteen miles away, when he bought this holding. He has allowed the Rose Lawn dwelling-house to go out of repair, and there is evidence tending to the conclusion that, if he had been allowed to sublet it, and could either have found a tenant for it who would put it into proper order as a residence, or could have got a Board of Works loan for that purpose, he might not have served his originating notice. But having served it, he is, in our opinion,

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entitled to have a fair rent fixed, with due regard to the special circumstances of the holding. By his notice he claims "the house and offices known as Willow Bank." The Sub-Commission made an allowance in respect of these. The landlord's notice of rehearing disputes this allowance. The Court valuers reported that "in the absence of information or evidence they were unable to place reliable value" upon any of the buildings, and that "they could get no information as to what portions were the property of the tenant, or of the landlord." The dismissal of the notice prevented the Land Commission from considering these sublettings. We have no jurisdiction to deal with the amount of rent, and we have not sufficient evidence to enable us to decide, so far as it may be a question of law, whether, or how, the expenditure of the under-tenant should be taken into account as between the parties who are before us, beyond holding that regard should be had to the circumstance that the holding comprises a second dwelling-house which, in pursuance of the lease, the tenant has been permitted to sublet as a residence, and to the letting value thereof. In giving effect to this circumstance the Land Commission may have to consider the further question, which we must not prejudge, as to the expenditure of the under-tenant. But however that may be decided, the present tenant Ryan is now receiving a well-secured rent of £42 10*s.* during the under-lease, and Willow Bank, at the expiration of the under-lease, will belong to him.

We shall, therefore, discharge the order appealed from, declare that, in the opinion of this Court, the Land Law (Ireland) Acts apply to the holding, and that the tenant is entitled to have a fair rent fixed thereon; but that in fixing such fair rent regard should be had to the letting value of Willow Bank, which has been sublet as a residence, with the landlord's consent, this declaration being without prejudice to any question, whether of fact or of law, which may arise as to the subtenant's expenditure, or any consequent increase in the letting value. With this declaration the case will be remitted to the Land Commission to proceed as to justice may appertain.

We may add that upon the principle underlying the question relating to the character of the holding *Hewson* v. *Listowel* (1)

(1) 32 L. R. Ir. 700.

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appears to be in point, and upon the second question, which Meredith, J., seems to have thought to be a novel one, namely, whether it is within the jurisdiction of the Land Commission, under such circumstances as exist here, to fix a fair rent upon an entire holding, part of which, taken by itself, is not agricultural or pastoral, the Act of 1896, sect. 7, sub-sects. 1 (*a*) and 2, expressly contemplates the case of a second dwelling-house which may be sublet.

As both parties required the case to be reheard by the Land Commission, and questions raised by them as to the amount of the fair rent are still open, and as the principle which we adopt is different from that upon which either the Sub-Commission or the Land Commission proceeded, all the costs of the proceedings before the Land Commission will be reserved for the decision of the Land Commission, but the landlord must pay the costs of this appeal.

WALKER, L.J.: —

For the proper understanding of the two questions raised in this case, it is necessary to state the character of the three subjects or denominations which were united by the letting of 16th August, 1859, in the lease then made to Alexander Duffield. He had previously held, under a lease of 30th November, 1850, for three lives, the same as in the lease of 1859, lands described as part of the lands of Clonlara, called Rose Lawn, containing 37 Irish acres, equivalent to 60A. 3R. 39P. statute measure, at a rent of £94 2*s.* 10*d.*, or £2 10*s.* per Irish acre. There was a provision that there should be only one dwelling-house on the land, and that Duffield should expend, before September, 1852, a sum of £147, in adding to the dwelling-house of Rose Lawn, or in building a new one. Duffield was also tenant of the house of Willow Bank, with 16 Irish acres attached, the rent of which appears by the rental to have been £48. Those two rents would amount to £142 2*s.* 10*d.*

By the lease of 1859 there was demised to Duffield that part of the land of Clonlara, otherwise Kilmurray, now called Rose Lawn, containing 60A. 3R. 39P. statute measure, equivalent to 37A. 2R. 25P. Irish, as formerly in the possession of the representatives of John Young, deceased, and now in the actual occupation of Alexander Duffield; and also all that part of the lands of Kilmurray, otherwise Clonlara, containing 22 Irish acres (equal to 35 statute), as

formerly in the possession of Mr. Nolan and Rev. Wm. Maunsell, and now in the actual possession of Alexander Duffield; and also that part of said lands now called Willow Bank, containing 16 acres (Irish), equal to 25 statute, with the dwelling-house and offices thereon as theretofore occupied by Captain Hickey; to have and to hold "the said demised premises" for three lives, of whom the Prince of Wales is the survivor, at the rent of £199 4*s.* 10*d.* Taking the rents as under the former lettings of Rose Lawn and Willow Bank, there would remain £57 as applicable to the 35 statute acres of Clonlara, upon which there was no house, and the acreable rents would be substantially the same, that of Willow Bank being £8 over an acreable rent of £2 10*s.*

The lease contains covenants applicable to the premises as a whole—that he will farm and manure them in a husbandlike manner, and against assignment and letting in conacre, and a proviso that only two dwelling-houses, with porter's lodge, shall be erected thereon, and a power to surrender on any 25th March.

On the 4th March, 1871, Duffield made a letting to Shaw of the house of Willow Bank, and gate-house on the avenue (in all 2 acres) for a term of thirty-one years, at a rent of £42 10*s.*; and on 28th January, 1881, Shaw sublet to Phelps for the term of twenty-one years, at a rent of £100 per annum. It is stated, but apparently only as a rough estimate, that Phelps expended £3000 on Willow Bank. The present tenant, Ryan, bought all the premises in the lease of 1859 for £735. The Sub-Commission fixed a fair rent of £150, and the landlord appealed on the grounds that the main object of the entire letting was residential: or, in the alternative, that inasmuch as a distinct and substantive part of the property held under the lease, viz. the villa residence of Willow Bank, was not agricultural or pastoral in its character, and was not the substantial part of the property, the Court should direct that the same should be treated as a separate holding, and held at such rent during the continuance of the tenancy as the Court might determine to be the proper proportion of the reserved rent. Mr. Justice Meredith decided that the portion of the premises of Willow Bank, comprised in the sublease to Phelps was not agricultural or pastoral in its character. The landlord offered to consent to a

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severance of Willow Bank, with the 16 acres demised along with it; and as the tenant declined this, the originating notice was dismissed, Mr. Justice Meredith also holding that no severance of Phelps' part of Willow Bank could be made under the 5th section of the Act of 1896.

Walker, L.J.

The first question argued before us was that the letting of the whole of the lands was residential by reason of the existence of the dwelling-houses, Rose Lawn and Willow Bank; and for that purpose counsel relied on the rent of £100 paid for Willow Bank, and an offer said to be made for Rose Lawn of £45 per annum, and also on certain highly-coloured auctioneer's advertisements for lettings of both premises.

In 1859 the valuation of the entire premises was £142, of which £118 5*s*. was on the land, and £12 on each of the houses. The valuation of Willow Bank is now £37 owing to Phelps' expenditure. Rose Lawn House was at the date of the lease in 1859, and still is, in great disrepair, and it would require a couple of hundred pounds to put it into tenantable order. It seems to me impossible to hold that the letting of over 122 acres, treating it as one demise, could be made residential by the existence on it of these two houses; or, in the words of the Act of 1896, that the main object of this single letting was for a residence: for that is the test which must be applied since the Act of 1896. The lease is an agricultural one, and comprises 22 Irish acres of land on which there is no house; any residential character which attached to the part became obliterated by fusion in the whole, and the covenants are such as are strictly applicable to a lease of a farm of 123 acres; and the existence of two dwelling-houses on the land is contemplated, in which there is nothing repugnant to the idea of a holding for which rent could be fixed. This point was not very much pressed.

The second question raised by the counsel for the landlord requires more consideration, especially as Mr. Justice Meredith decided it in the landlord's favour. It was said that Willow Bank, as comprised in the sublease, is not agricultural or pastoral, and that therefore the whole tenancy must be excluded or that, at all events, a distinct and substantive part of the property was not agricultural or pastoral, and therefore that the tenant could only

come in under and subject to the conditions mentioned in sect. 5, sub-section 2.

I do not think these contentions can succeed. The letting here is of a consolidated holding—of three subjects which are separately described and demised only for identification; the *habendum*, rent, and covenants apply to the consolidated thing, therefore it must be treated as one demise of 123 acres with the dwelling-houses of Rose Lawn and Willow Bank on them. In every demise of a farm which includes a dwelling-house on the land, the house, if you look at it apart from the land, is not agricultural or pastoral, but such house could never be held to be a "distinct and substantive part of the property held under one demise," not agricultural or pastoral in character. It is true that if the letting comprises also, say houses in a town, or an hotel, the case is different. In truth it seems to me that any excluding character of Willow Bank could not survive the making of the lease, for it became then a dwelling-house on a farm of 123 acres, and no more non-agricultural or pastoral than any farmer's house is.

But, then, it was argued that the subletting made a difference, and though the subletting left Willow Bank in the deemed occupation of the tenant, it still became non-agricultural or pastoral, so that the tenant was under the law before the Act of 1896 excluded.

It was admitted for the purposes of the case that the subletting was with the consent of the landlord, and therefore within the provision applicable to such a case in the Act of 1881, or that it was within sect. 7 of the Act of 1896, sub-sect. 1 *a*, and not excluded by the proviso 2. In that state of things it follows, in my opinion, that where the tenant is so deemed in occupation he is, for the purpose of fixing a fair rent, and for all the purposes of his claim, an occupying tenant of the whole demised subject as if it had never been sublet.

In the case that I have put of the demise, including houses in a street, or hotel, which I use only as illustrations, they would be non-agricultural or pastoral, whether sublet or not, and would remain such though the letting was amalgamated in a lease of larger area.

I do not say that a tenant may not so deal with an existing

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building on his holding, or erect some new building of such a character, as to create a non-agricultural or pastoral subject upon it; but I am satisfied that such a result will not follow from the tenant improving a house or making expenditure on the offices or surroundings of it, or even making it by his improvements unsuitable to the holding, in the sense in which "unsuitable" is used in the Acts. It does not follow that where the expenditure is made by a sub-tenant the tenant is to get the entire benefit of it in rent. I express no opinion on that matter, which remains open for the Land Commission; as a fact, Willow Bank was very little structurally altered; there was not much outside work done on it, and Hunt, the landlord's valuer, puts £40 per annum on it as it stands, which contrasts greatly with the fancy price paid by Phelps. The description of it in the Court valuer's report is "a beautifully situated and neat comfortable residence with compact well laid out offices, and appears to be in excellent order."

In result I think that whatever may have been the original character of Willow Bank and 16 acres, it became indissolubly merged in the 123 acres demised in 1859. The map on the lease retains no division, and affords no materials for redistributing the former integral parts, and therefore we must now look at this holding as a whole with the residence of Willow Bank upon it; and this is not affected by the lawful sub-letting, which leaves the tenant for the purpose of fixing a fair rent in material occupation of the whole.

I concur, therefore, that the tenant is entitled to have a fair rent fixed.

HOLMES, L.J.:—

The result of the judgment of the Court will be to entitle the tenant to have a fair rent fixed on a portion of his holding of about two acres in extent which he sub-demised previous to the Land Act of 1881, which cannot since be called agricultural or pastoral, and which has now become one of the most attractive residences on the banks of the Shannon, yielding a rent fixed at £100 a year, even before it was improved by an expenditure of over £1600.

Although such a result was probably not contemplated in the Irish Land Law Code, this is no reason for the Court declining to give effect to it, if we are satisfied that it follows from the true construction of the enactments. Legislation can only be carried out by having regard to the ordinary and normal transactions of mankind, providing, indeed, at the same time for such exceptional circumstances as can be foreseen, but still leaving unanticipated many individual cases which are sure to arise in the multiplicity of human dealings.

The present is, undoubtedly, a peculiar case; and although I have no doubt as to how it ought to be decided, I am anxious that the grounds of my decision should be understood.

It is, I think, clear that the lease of 1859 made the lands what has been called a homogeneous holding in the hands of the tenant, and that thereupon every part of the demised premises became agricultural or pastoral. I am far from saying that they did not bear this character before—on the contrary, of the three parcels of land then consolidated, one containing about 35 statute acres, which had no house on it was, undoubtedly, agricultural and pastoral—another called Rose Lawn, containing 61 statute acres, which had been previously leased and surrendered, was probably so; and the only really doubtful portion was Willow Bank, with the 26 statute acres attached thereto, of whose history we know comparatively little. The lease of 1859 is to my mind clear evidence that the landlord determined to make of these several parts a single farm, the only peculiarity of which was that it had two residences on it—not an unusual circumstance I apprehend when holdings are consolidated.

Now it is quite possible that lands let as a farm may be so treated by the tenant as to lose either in whole or in part their agricultural character. If, to take an example somewhat resembling the present case, a man holding under a long lease lands bordering on the Shannon, finding that there was a market for ornamental residences on the banks of the river, and that a portion of the demised premises had amenities for the purpose, were to erect some handsome villas to meet this demand, I should be prepared to hold that he had thereby deprived himself of the right to have a fair rent fixed, unless in so far as he would be entitled to have the property

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separated into two parts under the provisions of the Act of 1896, sect. 5, sub-sect. 2. Notwithstanding an apparent likeness between such a case and that before the Court, they are in truth essentially different. Although everyone, whether farmer or not, needs a residence, the house on a farm in which the farmer lives is part of the farm; and it has never been suggested that it is not of an agricultural character. So, too, if from accidental circumstances, there are two dwelling-houses on a farm, either of which may be selected by the farmer as his residence, it cannot be said that if he lives in one and leaves the other vacant, he loses the right to have a fair rent fixed on the holding in its entirety. Going a little further, I take a case in which the farmer for some accidental reason does not desire to live in the only dwelling-house on the land, and with the consent of the landlord lets it to a stranger. Mr. Cherry has argued that before the Act of 1896 the result would have been that a fair rent could not have been fixed on the holding at all; and that now the tenant's only right would be under sect. 5, sub-sect. 2 of that statute. I do not agree with either branch of the proposition. Even under the former law, I should have held that although the house was not used for the time being for agricultural purposes, it was still the dwelling-house belonging to the farm, and to be regarded as part thereof; and if there was any doubt before, it is removed by the change of definition in the Act of 1896, which introduces the word "substantially" into the first class of tenancies excepted from the Land Acts. The exception now runs, "a tenancy in any holding which is not substantially agricultural or pastoral in its character." A holding still continues to be substantially agricultural or pastoral, notwithstanding that the farm house is let to a stranger.

I am of opinion that everything I have said on this subject applies equally to a farm on which there are two dwelling-houses —one retained by the tenant and the other let—and is, therefore, applicable to the case before the Court.

Here there were two residences, when the letting was made to Duffield in 1859, each suitable for the holding. The tenant might have occupied either, and at first he selected Willow Bank. He afterwards removed to Rose Lawn, and with the consent of the

landlord let Willow Bank on lease. He does not appear to have improved either house. He was, according to the evidence, a poor man, and the present state of Rose Lawn shows that there has been no expenditure on it for many years. Willow Bank, however, has been converted into a handsome villa, which a gentleman of leisure would find a charming residence. This has been done by Duffield's tenant and sub-tenant; and as between Duffield's successor in title and the landlord, it is still to be regarded as part of the holding on which a fair rent is to be fixed.

Beyond this, the judgment of the Court does not go. When the Land Commission comes to fix the rent, questions of importance, and it may be of difficulty, will arise. The improvement of Willow Bank has added much to the value of the lands, but probably not in an agricultural or pastoral point of view; and the expenditure has not been from the tenant's money, or made in pursuance of any contract with him; nor can the person who incurred it be compensated for it under the Land Acts.

I say nothing as to what is the legal consequence of this state of circumstances. It is for the Land Commission to proceed as law and justice may require.

Solicitor for the tenant: *F. M. Fitt.*
Solicitor for the landlord: *Beauchamp.*

R. D. M.

Q. B. Div. 1899. Jan. 13.

TATLOW *v.* BYRNE AND SHAW, LIMITED (1).

(1898. No. 17,667.)

Practice—Motion for judgment—Specially-indorsed writ—Amendment of claim indorsed on writ without altering the sum claimed for costs—Order III., R. 7, and Order LXXXIV., R. 2—Cross-motion to set aside the writ as irregular.

Where the claim on a specially indorsed writ is amended by reducing the amount claimed, but the sum claimed for costs is not correspondingly amended, and is thereby excessive, the writ is still a good specially indorsed writ for the purposes of a motion for judgment, and will not be set aside as irregular.

MOTION on behalf of the plaintiff for judgment for the sum claimed in the writ; cross-motion by the defendants to set aside the writ as irregular, on the ground that an excessive sum was claimed for costs.

On the 28th of November, 1898, the plaintiff issued a writ of summons, specially indorsed, in which he claimed the sum of £21 6*s.*, on foot of a bill of costs. He also claimed in the writ the sum of £2 10*s.* for costs. On the 16th of December, 1898, the defendants entered an appearance to the writ. On the 17th of December, 1898, the plaintiffs' solicitors went to the office of the defendants' solicitor, and amended the writ by altering the sum claimed from £21 6*s.* to £19 1*s.* 4*d.* He did not alter the amount claimed for costs. On the 20th of December, 1898, the plaintiff served notice of motion for leave to enter judgment for the amount claimed on the writ, as amended. The defendants, on the 9th of January, 1899, served a cross notice of motion to set aside the writ as irregular, on the ground that an excessive sum was claimed for costs. Both the plaintiff and the defendants resided within the same civil-bill jurisdiction. The cross-motion was heard first:—

(1) Before KENNY, J.

Hynes, for the defendants :—

The plaintiff had the option of specially indorsing his writ or not. If he treats it as a specially indorsed writ, then the claim for costs is excessive, and the writ should be set aside as irregular. If he treats it as an ordinary statement of claim, then he cannot move for judgment. The claim for costs is part of the indorsement under Ord. III., R. 6. [He referred to Ord. III., R. 7, and Ord. XXVII., Rr. 2 and 8.]

Leech, for the plaintiff :—

Order XXVIII., R. 2, gives a plaintiff power to amend his statement of claim without amending the rest of the writ. The statement of claim is the part indorsed and does not include the claim for costs. This is merely an attempt to meet the motion for judgment by a technical objection. There has been undue delay in moving to set aside the writ for irregularity; Order LXXXIV., Rule 2.

KENNY, J. :—

This is an application to set aside the writ of summons on the ground of irregularity. The irregularity alleged is that the plaintiffs having amended the claim indorsed on the writ so as to reduce the amount below £20, has allowed the indorsement which claims £2 10*s.* for costs to remain unaltered. Had the writ originally claimed a sum for debt not exceeding £20, together with £2 10*s.* for costs, it would unquestionably have been irregular. But what has taken place is this. The writ was issued on the 28th November, 1898, and an appearance was entered thereto on the 16th December, 1898. As the claim then stood it was for £21 6*s.*, alleged to be due on foot of a bill of costs, and the writ had the necessary indorsement under Order III., R. 7, that further proceedings would be stayed if the debt were paid, together with £2 10*s.* for costs within four days after service. The sum thus named for costs was correct, if both parties did not reside within the same civil-bill jurisdiction. On the day after appearance the plaintiff's solicitor went into the office of the defendant's solicitor, and amended the writ by altering the claim for £21 6*s.* to £19 1*s.* 4*d.*, but he made no change in

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the amount claimed for costs. No objection has been taken to the amendment, on the ground that an order of a Judge for the amendment should have been obtained. Apparently an order ought to have been obtained, as the indorsement was treated by the plaintiff as a special one under Ord. III., R. 6, and Ord. XIV., R. 1, and not as a pleading capable of being amended without leave under Ord. XXVIII., R. 2. Neither has any point ever been raised as to non-service of the amended writ, and it seems to have been accepted that if plaintiff had at the same time when he amended his special indorsement also reduced to its proper amount the sum claimed for costs, there would have been no irregularity to complain of. In these circumstances is the defendant entitled to set aside the writ on the solitary ground alleged in his notice of motion? The object of the indorsement as to costs is to enable the defendant to settle the action within the four days on payment of the debt, and the particular sum named for costs. If the defendant does not admit the full amount to be due for debt he can tender the amount which he does admit, and a sum of costs commensurate, under the rule, with the debt. The defendant could have adopted that course in the present case, but he either denied the debt altogether, or he was unable to pay what he admitted to be due, and he took no further notice of the writ until the 9th January. On the 20th December, 1898, the plaintiff had served notice of motion for final judgment, and it was not until the 9th January, 1899, that the present notice of motion was served. Under these circumstances it seems to me that the defendant must be regarded as abiding by his appearance entered on the 16th December. He does not treat the special indorsement on the writ as a pleading by either moving under Ord. XXVIII., R. 4, to disallow the amendment, or by pleading under Ord. XXVIII., R. 5, to the amended writ, and he must, in my opinion, be taken as recognizing the amendment to be one regularly made—so far as the indorsement of the claim for debt is concerned—in a specially indorsed writ on which, as he must have known, the plaintiff could move for judgment. I am unable to see that there was any irregularity of which the defendant is entitled to complain, and if there was, I think that having waited until the plaintiff served his notice for final judgment, it is now too late for him to rely on it in a motion like the present,

even if Ord. LXXXIV., R. 2, did not constitute an absolute bar. The cross-motion must therefore be refused.

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Solicitor for the the plaintiff: *Plaintiff in person.*
Solicitor for the defendants: *R. Robinson Black.*

J. M°G.

JOHN KELLY *v.* WM. COLHOUN, JOHN MOLLOY, AND P. M'LOONE (1).

Q. B. Div. 1899. Jan. 24, 25.

(1898. No. 14,031.)

Practice—Discovery of documents—Libel—Conspiracy—Inspection of manuscript of the libel—Privilege—Form of affidavit—R. S. C., Ir., Order XXXI., Rule 13.

Where separate claims for damages for libel against a newspaper proprietor and other defendants are joined with a joint claim against them for the same libel, and also with a joint claim against them for damages for conspiracy to defame and injure, the proprietor of the newspaper, even where he admits publication of an exact copy of the libel, cannot refuse to produce the manuscript of the libel, either on the ground of privilege, or on the ground that its production might tend to incriminate him, if the Court comes to the conclusion that he does not honestly believe that its production will have that effect. To entitle a defendant to refuse discovery on the last-mentioned ground his affidavit must show that he believes the production of the document will tend to incriminate him.

MOTION on behalf of the plaintiff for an order, that the defendant William Colhoun shall produce at the office of his solicitor, for the inspection by the plaintiff or his solicitor and agents, the manuscript of the publication complained of in the third paragraph of the claim, and mentioned in the affidavit of documents of the said defendant William Colhoun, as No. 1 in the second part of the first schedule thereto.

The plaintiff in his statement of claim claimed damages against the three defendants, separately, for an alleged libel published of

(1) Before MURPHY and KENNY, JJ.

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him in a paper called the *Londonderry Sentinel*, of which the defendant Colhoun was the proprietor. He claimed damages against the three defendants, jointly, for the same libel, and he also claimed against them, jointly, damages for conspiracy to defame and injure him. Originally the claim for damages for conspiracy included the defendants, Molloy and M'Loone, only. But, in response to a notice served on him by Colhoun, the plaintiff amended his claim for damages for conspiracy so as to include the three defendants. The defendants Molloy and M'Loone by their defences traversed the publication of the libel, and pleaded justification. The defendant Colhoun admitted publication of the libel, but pleaded that he published it without actual malice or gross negligence, an apology, and payment of £10 into Court. The plaintiff obtained an order for discovery of documents. The defendant Molloy in his affidavit made in obedience to the order, said that he had not, and never had in his possession, any document relating to the matters in controversy. The defendant M'Loone in his affidavit admitted that he had the manuscript of the alleged libel in his possession, but that he had sent it to the defendant Colhoun, and that the latter had it now. The defendant Colhoun in his affidavit admitted that he had the manuscript, but stated that he objected to produce it, as he had already in his defence admitted its publication in the fullest manner.

The defendant Colhoun in paragraphs 2 and 3 of an affidavit filed to resist the motion, set out the grounds of his objection to produce the document. The two paragraphs were as follows :—

2. "That I object to produce the document mentioned as No. 1 in the second schedule of the affidavit of discovery sworn by me on the 5th day of January, 1899, as I am advised that in cases of libel it is not the practice of the Court to order production for inspection of the original document which was published and which is the libel complained of, when the publication of same has been admitted, and the publication in the newspaper is an exact copy of the document in the defendant's possession.

3. "That I am advised that so far as the charge of conspiracy is concerned, I am entitled to refuse to produce the original document on the ground that its production might tend to incriminate me."

Drummond, Q.C., and *A. Todd* (with them *O'Shaughnessy, Q.C.*), for the plaintiff:—

We ask for this document on the ground of its materiality on the count for conspiracy, and also to prove publication against the other defendants. Its production cannot incriminate Colhoun further than his own admission has done. He does not swear that he "believes its production will incriminate." He only swears that "he is advised that it might tend to incriminate him." We do not press the claim for conspiracy against him as a real claim; he forced us to include him by his notice. This is not a case of a sole defendant in an action for libel. Cases of that sort do not apply to this case. [They referred to *Hope* v. *Brash and Another* (1); *Bustross* v. *White* (2); *Lamb* v. *Munster* (3); *Roe* v. *New York Associated Press* (4); Ord. XXXI., R. 13; App. B., Form 9; *Webb* v. *East* (5).]

Cooke, Q.C., and *Henry, Q.C.* (with them, *Osborne*), for the defendant William Colhoun:—

The defendant Colhoun admits publication, that he has the document, and that it is a libel. Therefore the plaintiff has all the information he is entitled to from him. He has nothing to do with the other defendants. The document is privileged, as its production would tend to incriminate him. If the claim for conspiracy is not a real claim against him, then the Court should not assist the plaintiff to make it out against him. If it is a real claim, then the document is privileged. The point was not taken in our affidavit made in obedience to the order for discovery, but privilege can be claimed at any time. [They referred to *Hope* v. *Brash* (1); *Bradley* v. *Clayton* (6); *Spokes* v. *Grosvenor & West End Railway Terminus Hotel Company* (7).]

MURPHY, J.:—

Jan. 25.

This case is most peculiar in its circumstances. A gentleman brings an action for libel against three persons, and he adds a

(1) [1897] 2 Q. B. 188.
(2) 1 Q. B. D. 423.
(3) 10 Q. B. D. 110.
(4) 75 L. T. (N. S.) 31.
(5) 5 Ex. D. 23, 108.
(6) 26 L. R. Ir. 405.
(7) [1897] 2 Q. B. 124.

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count for conspiracy. The libel is set out, and is contained in a resolution supposed to be put forward, at a meeting of a Board of Guardians, by two gentlemen who are defendants; and the terms of the libel are there stated, and are well known to both parties. The other gentleman has published the libel for circulation in his newspaper. His defence is—"I published the libel as it is stated, and I pay £10 into Court when entering my defence." He has the document in his possession, the original document containing the libel, which he published. With respect to the other two defendants, one says, "I had the original document in my possession." Still, he denies publication in his defence. He says, "I lent it to the editor of the newspaper, and he has it now." The other denies publication altogether, and strives to keep himself out of all connexion with the document. The plaintiff seeks to obtain inspection of this document. Now, it may be essential for him for the purpose of proving his case against the third defendant on the count for libel, to have inspection of that document, as it may turn out to be in his handwriting. For the purpose then of carrying on his case he seeks inspection of the document. It is in the possession of the gentleman who now resists the motion, the editor of the Londonderry paper. He resists the application made for the production of the document on these grounds:—"I object to produce it for this reason—I admitted its publication, and I am ready to bear responsibility for that. I estimate the damage done to you at £10, and I bring that sum into Court." Undoubtedly, supposing it were solely an action for libel against him, and he said, "I admit the publication of this libel; I have the document in my possession, but I will not produce it, for it can do you no further service. It may enable you to find out who the person was that wrote it and sent it to me for publication, but I contend you are not entitled directly to obtain that knowledge from me." There is, upon the decisions, authority that would establish defence for him to the motion. For, in that case, where the publisher of the paper was the sole defendant, it was obvious that the sole object of the motion was to see whether they had an action against other parties; and the Court were of opinon that where plaintiff could derive no other benefit, they would not make such an order. This is not the case of a sole defendant, and where

it is an action for libel against three defendants, where one of them admits the publication, but refuses to produce the document, there is no ground shown for resisting the motion. But Mr. Henry gave up that part of the case and relied on the fact of there being a count for conspiracy, and that it might tend to bring him within that count and subject him to a criminal charge, and therefore he objected to produce the document. Now, it is very difficult to see how it could incriminate him further than the facts he himself has stated. He admits he published it, and in its very terms. The production of the original document could not put him in greater danger than that admission places him in. But is this endeavour to resist the production of the document right?

The Master of the Rolls in *Webb* v. *East* (1), expresses a doubt as to whether documents in a case like this are protected at all. And Baggallay and Cotton, L.JJ., concur in the fullest manner in the judgment of the Master of the Rolls. But has this defendant in this case any reasonable apprehension of a prosecution? I am of opinion it is clear he has not. The paragraph in his affidavit has been framed in a deliberate and studied manner to evade saying, what the Master of the Rolls, in *Webb* v. *East* (1), says he must say, before the Court can come to the conclusion, which his counsel asks the Court to come to. He says "he is advised that he is entitled to refuse production of the document, as it might tend to incriminate him." He does not say he "believes this." Why? Because, in my opinion, he has no apprehension the production of the document "would tend to incriminate him." But he seeks, relying on the practice of the Court, to make himself a shelter for the other defendants. Under these circumstances I am of opinion that there is no real ground shown for resisting the motion for production of the document.

KENNY, J.:—

I concur in the judgment of my brother Murphy. This motion for inspection is directed against only one of the three defendants, and the objection to it taken by him has been suggested by the count for conspiracy in the statement of claim. The

(1) 5 Ex. D. 108.

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claim is a somewhat peculiar one. It contains counts for libel against the three defendants jointly, and then separate counts for the same libel against each defendant separately, and it winds up with a count against all three for conspiracy. The defendant Colhoun has put in a plea admitting publication and paying £10 into Court. In the defences of the other defendants they have expressly denied publication. Under these circumstances the plaintiff obtained an order for an affidavit of documents. In his affidavit of discovery the defendant Colhoun set out in the second part of the schedule the documents he objected to produce, and the grounds of objection. Order XXXI., R. 13, provides that the affidavit of discovery shall specify which, if any, of the documents the party against whom the order is made objects to produce, and that it shall be in the form specified in the rule. The form contemplates a statement of the grounds of objection, and it has been settled by numerous cases that the reasons for objecting must be clearly and distinctly stated, and that the mere averment that "the documents are privileged" is insufficient. Now, in the affidavit of discovery here, the only objection taken is, that the defendant Colhoun having admitted publication of the libel in the clearest manner, and accepted responsibility, should not be asked to produce the original document containing it. If this were an action for libel against Mr. Colhoun alone, *Hope* v. *Brash* (1) might be held to apply, and possibly inspection of the original document might not be ordered. But it is not for the purposes of the case against the defendant Colhoun that the inspection here is sought. It is with reference to the case against the other defendants. It will, as against them, be a necessary document in the plaintiff's proofs at the trial, and the defendant Colhoun could not object to produce it on subpœna. If so, it is impossible for him to rely upon the objection that he has admitted publication, and that *Hope* v. *Brash* (1) applies. The plaintiff accordingly has moved for inspection, but before doing so he served a notice calling upon Colhoun to give the names of the persons who wrote the libel and who sent the document to him. This, Colhoun refused to do. There was no other course open to the plaintiff but to come to the Court. Then

(1) [1897] 2 Q. B. 188.

for the first time an affidavit is put in making the objection which is relied upon as a ground for resisting this application. I do not say that Colhoun is precluded from now relying on that objection, but it is a curious fact that it never occurred to him or his advisers to rely upon it in the affidavit of discovery. As it stands the affidavit is framed in the most evasive way. He says that, "I am advised that so far as the charge of conspiracy is concerned I am entitled to refuse to produce the original document, on the ground that its production might tend to incriminate me." It is for us to decide whether there is any reasonable likelihood that its production might incriminate him. He has already admitted publication of the libel, and I have not been convinced by the arguments addressed to us that the production for inspection of this document is likely to subject him to any more or greater danger than his admission of publication may have involved him in. But even if it did, I would be very slow to come to the conclusion that on that account he was to have the power of placing an insuperable difficulty in the way of plaintiff proving his case against other parties. If Colhoun were not a defendant in this action and was subpœnaed to produce this document at the trial, could he refuse? Mr. Henry admitted that he would be bound to produce it. If that be so, his being a party to the record does not give him any further or different rights in this respect. The document is one relating to the action. It is essential as one of plaintiff's proofs against the other defendants, and I concur with Mr. Justice Murphy that the defendant has shown no valid ground for his refusal to allow inspection of it. The motion must be granted with costs (1).

Solicitors for the plaintiff: *Todd & Mark.*

Solicitors for the defendant Colhoun: *David R. Babington & Co.*

J. M°G.

(1) On appeal a consent was entered into that the order of the Court below should be affirmed on the plaintiff consenting not to bring any further or other cause of action against the defendant Colhoun, or any person on his staff, and that the name of the defendant Colhoun be struck out of the count for conspiracy.

R. D. M.

Q. B. Div.
Bankruptcy.
1899.
Jan. 17.

In re HAYES, a Bankrupt (1).

Bankruptcy—Bill of sale—Payment by instalment—Bankruptcy before default—Reputed ownership—Consent of true owner—20 & 21 *Vict. c.* 60, *s.* 313—46 *Vict. c.* 7, *ss.* 7, 15.

Where a person is in possession of certain chattels, of which he has executed a bill of sale, and is subsequently adjudicated a bankrupt, before making any default in payment of the sum thereby secured, such chattels are to be deemed to be in the order and disposition of the bankrupt, with the consent of the true owner, within the meaning of sect. 313 of the Irish Bankrupt and Insolvent Act, 1857 (20 & 21 Vict. c. 60).

In re Ginger; Ex parte the London and Universal Bank ([1897] 2 Q. B. 461), disapproving of *In re Stanley* (17 L. R. Ir. 487), followed and approved.

This was an application on behalf of the assignees to have it declared that certain chattels should be deemed to be in the order and disposition of the bankrupt, with the consent of the true owner, within the meaning of section 313 of the Irish Bankrupt and Insolvent Act, 1857 (20 & 21 Vict. c. 60).

On November 10th, 1897, Jeremiah Hayes, a leather merchant residing in Waterford, gave to Eugene O'Callaghan & Sons, of George's-street, Limerick, merchants, a bill of sale over certain shop goods specifically enumerated in a schedule thereto, to secure the sum of £72 9*s.* 5*d.*, being the amount of a judgment and costs recovered by them against him. The principal sum thus secured, together with interest, was made payable in one instalment on the 5th November, 1898, and the bill of sale further contained the following proviso:—"Provided always that the chattels hereby assigned shall not be liable to seizure, or to be taken possession of by the said Eugene O'Callaghan & Sons, for any other cause than those specified in section 7 of the Bills of Sale (Ireland) Act, 1879, Amendment Act, 1883."

Jeremiah Hayes was adjudicated a bankrupt on August 16th, 1898.

R. Doyle, for the assignees:—

Although the date of the adjudication in bankruptcy is prior to that fixed by the bill of sale for payment, the bankrupt must be

(1) Before Boyd, J.

deemed to be in possession of the goods with the consent of the true owner: *In re Ginger; Ex parte the London and Universal Bank* (1). No doubt *In re Stanley* (2) is a conflicting authority, but that case was cited to the Court in *In re Ginger* (1), and was not followed.

Corvan, for the grantees of the bill of sale:—

We rely on the decision in *In re Stanley* (2), which is a decision of a Court of co-ordinate jurisdiction, and binding on this Court until overruled by a Court of Appeal. The case of *Spackman* v. *Miller* (3), so much relied on in *In re Ginger* (1), is distinguishable. Before the recent Act a mortgagee by giving 24 hours' notice could repossess himself of the goods mortgaged at any time, but the grantee in a bill of sale cannot now take possession except in certain events, and therefore cannot be said to consent to the possession of the grantor before one of those events has happened. Until the right to seize has arisen, a grantee of a bill of sale appears to be no more able to consent than a trustee of a settlement who is ignorant of the trust, or a person under age during his minority: *In re Mills' Trusts* (4). [He also cited *Joy* v. *Campbell* (5); *Reynolds* v. *Bowley* (6); *Holderness* v. *Rankin* (7); *Muller* v. *Moss* (8); Weir on Bills of Sale, p. 316.]

BOYD, J.:—

In the conflict of decisions that occurs in the present case, I am of opinion that I should follow the decision pronounced in *In re Ginger* (1), more especially as the Judges carefully considered and disapproved of the previous decision in the case of *In re Stanley* (2). That case, which was decided by Judge Miller, was referred to by both of the Judges who delivered judgment in *In re Ginger* (1), and both of them expressed the opinion that Judge Miller had gone wrong in not following the case of *Spackman* v. *Miller* (3). However much I may respect the decision of Judge Miller, I cannot disregard the recent decision, which is on all fours with the present case. I may also say that I entirely agree with the decision in *In re Ginger* (1).

Now what is the present case? It is an ordinary case of a

(1) [1897] 2 Q. B. 461.
(2) 17 L. R. Ir. 487.
(3) 12 C. B. (N. S.) 659.
(4) [1895] 2 Ch. 564.
(5) 1 Sch. & Lef. 328.
(6) L. R. 2 Q. B. 474.
(7) 29 L. J. (N. S.) Ch. 753.
(8) 1 M. & S. 335.

Q. B. Div. 1899.

In re HAYES.

Boyd, J.

shop-keeper in possession of goods for business purposes, of which he had executed a bill of sale. The Bills of Sale Act does not impose upon the grantee of a bill of sale the necessity to abstain from taking possession of the goods for any period of time. The fixing of such time is left to the parties themselves, and the statute merely gives legislative sanction to the agreement made between the parties, provided the provisions of the statute be complied with. Judge Miller has held that, during the currency of the term given in pursuance of the statute, the goods do not remain in the disposition of the grantor by permission of the true owner. According to him it is a possession by reason of the statute, and not a possession by the consent and permission of the true owner. That opinion has been criticised by both of the Judges in the case of *In re Ginger* (1), and both of them came to the conclusion that it was not well founded. Wright, J., expressly says, at p. 467 of the report: "I think on the authority of *Spackman* v. *Miller* (2) that we must hold that the consent of the true owner to the goods remaining in the possession of the grantor is given by the bill of sale itself." In the case of *In re Ginger* (1), *Spackman* v. *Miller* (2) and several other authorities were referred to. In *Spackman* v. *Miller* (2), Willes, J., at p. 676, referred to a case of *Bryson* v. *Wylie*, contained in a note to *Lingham* v. *Biggs* (3), in which Lord Mansfield says:—"I have no doubt that this is a new experiment to defeat the bankruptcy laws. The law has said that a trader cannot mortgage his effects and at the same time keep possession. What is the case here? He sells and keeps possession, and pays interest for the money. If this contrivance were suffered, it would open a door to avoid the statute, and therefore it ought not to be allowed to prevail." In their decision in *Spackman* v. *Miller* (2) all the Judges with the exception of Byles, J., who not having heard the whole case, expressed no opinion, thought that the statutory possession was a possession given with the consent of the true owner, by reason of the mortgagee giving a time within which he might possess himself of the goods, if he chose to exercise his power. With this opinion I entirely concur.

Solicitor for the assignees: *Hanmore.*

Solicitor for the grantees of the bill of sale: *MacNamara.*

J. MAC M.

(1) [1897] 2 Q. B. 461. (2) 12 C. B. (N. S.) 659. (3) 1 B. & P. 83.

MORGAN, APPELLANT; M'CLURE, RESPONDENT (1).

Q. B. Div. 1898.

Feb. 7. Nov. 2, 5.

Life Assurance Company—The Collecting Societies and Industrial Assurance Companies Act, 1896 (59 & 60 *Vict. c.* 26), *ss.* 3, 16—*Notice of default before forfeiture—Mode of service.*

Notice of default before forfeiture of an insurance policy, as required by section 3 of the Collecting Societies and Industrial Assurance Companies Act, 1896, is well served, within section 16 of that Act, if sent by post addressed to the assured at his last known place of abode.

CASE STATED, pursuant to 20 & 21 Vict. c. 43, for the opinion of the Queen's Bench Division of the High Court, by the Justices of the Peace of the city of Belfast, in the matter of a summons heard before them at Petty Sessions, holden on the 18th June, 1897, wherein the complainant (the now respondent), William M'Clure (therein described as of 3, Mountjoy-street, Belfast), sued William Morgan, as agent on behalf of the Scottish Legal Life Assurance Society, for the sum of £11 2*s.*, due upon foot of a policy of insurance, dated the 14th February, 1896, on the life of one Mary M'Clure (complainant's wife), who died on the 23rd May, 1897, at Belfast, and who was assured in the said Society. The assured, in whose own name (or in whose name jointly with the complainant, her husband) the policy was taken out, was described therein as of 33, Mountjoy-street, Belfast.

At the hearing before the Justices, the complainant produced the original policy, and the "contribution book" for same; and proved the death of the assured, producing the certificate of her death. For the defendant, a collector, named Hodgins, was examined, from whose "collecting book" it appeared that the amount of arrears was 9*s.* (the premium being 2*d.* per week). There was an entry, in the collector's book, under the date 4th January, 1897, of 1*s.*; but the collector swore that same had not been received by him, but was advanced by him on behalf of the

(1) Before O'BRIEN, JOHNSON, and GIBSON, JJ.

Q. B. Div. 1898.

MORGAN, *Appellant*; M'CLURE, *Respondent*.

complainant, William M'Clure. The complainant stated, in evidence, that his wife had told him that she had paid this amount to the collector; but there was no corresponding entry in the "contribution book" of the assured.

On the 26th February, 1897, a notice was sent by the Society, in the ordinary course of post, in an open envelope, stamped with a ½*d.* stamp, addressed, "Mr. William M'Clure, 66, Sugarfield-street, Belfast," of which the following is a copy:—

No. A. 150,137.

[When writing anent this Notice, please refer to this number and agency.]

NOTICE OF ARREARS.

SCOTTISH LEGAL LIFE ASSURANCE SOCIETY,
84, WILSON-STREET, GLASGOW.

Notice is hereby given, in terms of 38 & 39 Vict. c. 60, and the Society's Rules, that your premiums are in arrear, as undernoted. If not paid in accordance with the Society's Rules to your collector, or at the District or Chief Office of the Society, within sixteen days from the date hereof, all benefits will be forfeited.

Total arrears, 7*s.* 11*d.*

To WM. M'CLURE, and two others,
66, Sugarfield-street, Belfast

Signed, &c.

Glasgow, 26/2/'97.

This notice was returned by the Post Office, marked "*Undelivered for reason stated, 'Not known,'*" and no further notice was served.

Upon the case, as originally stated by the Justices, it did not appear that "66 Sugarfield-street, Belfast," was "the last known place of abode" of the assured, Mary M'Clure, or of her husband, the complainant, or that it was her, or his, place of abode at any time, or for what reason the notice of default was addressed to William M'Clure, instead of to the assured. Accordingly, when the case came on for argument before the Court on the 7th February, 1898, it was found necessary to send back the case to the Justices for further information as to these matters, and their findings of fact thereon; but the Justices' reply was simply confined to a statement "that 'No. 66, Sugarfield-street, Belfast,'

to which the notice was posted, was respondent's last known place of abode." It therefore was left to be assumed, as the basis of the decision of the Justices—and, for the purposes of this report, it may be taken as assumed upon the argument of the case stated—that this notice of default was "sent by post to" *the assured* at her last known place of abode.

It was set out in the case stated by the Justices that the complainant contended that, at the date of the service of the notice, a sufficient number of weekly payments were not in arrear to justify forfeiture under the rules of the Society, taking into account the alleged payment of one shilling on the 4th January, 1897; but that the Justices ruled, as a matter of fact, that the complainant was not entitled to credit for this sum. They stated that it was further contended before them, for the complainant, that the notice of default had not been duly served within 59 & 60 Vict. c. 26, section 16. Having taken a week to consider their decision, the Justices (Mr. Nagle, R.M., as chairman, announcing the reasons for their conclusion) made an order in the complainant's favour for the amount claimed, £11 2*s*., with 12*s*. costs, on the ground that the statute required that the notice should be *left* at the last known place of abode (apparently of Wm. M'Clure), and that posting was insufficient (1).

Serjeant Dodd, and *Hanna*, for the appellant, contended that the service of the notice by post was a sufficient compliance with the statute (1); that the third mode of service mentioned in section

(1) The Collecting Societies and Industrial Assurance Companies Act, 1896, by section 3, provides that "a forfeiture shall not be incurred by any member or person assured in a Collecting Society or Industrial Assurance Company by reason of any default in paying any contribution, until after (*a*) notice stating the amount due by him, and informing him that, in case of default of payment by him within a reasonable time, not being less than fourteen days, and at a place to be specified in the notice, his interest or benefit will be forfeited, has been served upon him by or on behalf of the Society or Company; and (*b*) default had been made in paying his contribution in accordance with that notice."

Section 16 of the same Act provides that "where any notice is required by this Act to be served upon any member or other person, the notice shall be in writing, and either delivered or sent by post to him, or, in the case of a notice of default, left at his last-known place of abode."

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16 was an alternative one—a cumulative provision, directed to meet the case where the person concerned had gone away, without informing the society of his change of residence (an obligation specifically required by the rules of this particular company), and where it was impossible for the society or its officers to ascertain his whereabouts, and that therefore the decision of the Justices was wrong. They did not contend that the Act did not apply to the company in question.

Whittaker, for the respondent, argued that the last clause of section 16 was mandatory, and that it enacted, not an alternative method, but the *only* mode of compliance with the provisions of the Act, in the particular case of a notice of default.

THE COURT, at the conclusion of the argument, considered it necessary that the case should be sent back to the Justices for further information as to the facts.

Nov. 2. The case was listed this day to consider the additional information submitted by the Justices.

Cur. adv. vult.

Nov. 5. The judgment of the Court was delivered by—

GIBSON, J. :—

The substantial question argued in this case was the construction of the statute, 59 & 60 Vict. c. 26, section 16, which, it was conceded, applied to the assurance sued on. The 3rd section of that Act prohibits forfeiture of any insurance, unless notice has been served on the assured, stating the amount due by him, and that, in default of payment within a reasonable period, not being less than fourteen days, at a place to be specified in the notice, his interest will be forfeited.

The policy, which was effected on the life of Mary M'Clure, the complainant's wife, contained a condition (No. 17) which required notice in writing to be given of change of residence. Notice of default was sent by post on the 26th of February, 1897. The envelope was addressed to 66, Sugarfield-street, Belfast, which was the last known place of abode of the assured, but the notice was

returned by the Post Office marked, "Undelivered for reason stated, 'Not known.'" No further notice was served. The magistrates were satisfied as to the default, but held that the notice should have been "left at the last known place of abode," and that transmission by post was not sufficient. The 16th section, on the construction of which their decision was given, directs that any notice required by the Act to be served on any member or other person, shall be in writing, and either delivered or sent by post to him, or, in case of a notice of default, left at his last known place of abode. The magistrates held that the section, in case of a default notice, excluded sending by post. We, however, are of opinion that the last clause of the section allows an alternative or cumulative mode of service in addition to delivering or sending by post. The notice of default could have been given to the assured personally without leaving it at his residence, and, we think, transmission by post to his last known place of abode was sufficient.

The decision below was therefore erroneous, and the case should have been dismissed.

Solicitor for appellant: *J. Carr.*

Solicitor for respondent: *N. Tughan.*

A. E. R. J.

Appeal.
1898.

June 13-15, 30.

COMMISSIONER OF VALUATION *v.* SLIGO HARBOUR COMMISSIONERS (1).

Rating—Exemption—Property "dedicated to or used for public purposes"—Sligo Harbour Commissioners—Poor Law (Ireland) Act, 1838 (1 & 2 *Vict. c.* 56), *s.* 63—*Valuation Acts*, 1852 *and* 1854 (15 & 16 *Vict. c.* 63, *sections* 15, 16; 17 & 18 *Vict. c.* 8, *sect.* 2)—*Statute, interpretation of—Supreme Court of Judicature (Ireland) Act*, 1897 (60 *Vict. c.* 17).

The Commissioner of Valuation having included the property of the Sligo Harbour Commissioners in the revised lists of rateable property for the year 1896, the Commissioners appealed to the County Court Judge of Sligo, who allowed the appeal, but, at the request of the Commissioner for Valuation, stated a case for the opinion of the Queen's Bench Division.

The Sligo Harbour Commissioners were incorporated by that name by the Sligo Borough Improvement Act, 1869 (32 & 33 Vict. c. cxlvii., local), s. 24, and the harbour was by the same Act vested in them. This Act was amended by the Sligo Harbour Act, 1877 (40 & 41 Vict. c. xxxv., local), which gave the Sligo Harbour Commissioners powers to acquire lands, to execute works, to levy tonnage duties and rates on goods, and to borrow moneys, which, together with the revenue of the port, were to be applied in erecting and improving the quays, wharfs, and docks, in payment of the working expenses of the Commissioners, in paying the interest on the moneys borrowed, in providing the requisite annual instalments or appropriations for paying off the principal thereof, and in maintaining the works of the Commissioners, and generally in improving the port and harbour:—

Held (affirming the decision of the Queen's Bench Division), that the property of the Sligo Harbour Commissioners was "dedicated to or used for public purposes," and was within the exemption of the Valuation Acts.

Guardians of Londonderry Union v. *Londonderry Bridge Commissioners* (I. R. 2 C. L. 577) followed.

APPEAL by the Commissioner of Valuation from a judgment of the Queen's Bench Division on a case stated by the Chairman of Quarter Sessions for Sligo for the opinion of the Queen's Bench Division of the High Court at the instance of the Commissioner of Valuation.

The Sligo Harbour Commissioners were incorporated by the

(1) Before LORD ASHBOURNE, C., and FITZ GIBBON, WALKER, and HOLMES, L. JJ.

Sligo Borough Improvement Act, 1869 (32 & 33 Vict. c. cxlvii., local) s. 24, and the harbour was by s. 65 vested in them.

The said Act was amended by the Sligo Harbour Act, 1877 (40 & 41 Vict. c. xxxv., local) which gave the Harbour Commissioners powers to acquire lands (s. 55), to execute works (s. 62), to levy tonnage duties (s. 68), and rates on goods (s. 102), to borrow moneys (s. 110), which together with the revenue of the port were to be applied as in the Act directed (ss. 116 and 117) (1).

Previously to the year 1895 the property of the Harbour Commissioners had been distinguished in the Valuation Lists as being of a public nature, and was consequently exempt from all assessment for the relief of the destitute poor, and from Grand Jury and County rates. Before the 27th November, 1896, the Clerk of the Poor Law Union of Sligo transmitted to the Commissioner of Valuation a list of the property in the said Union which, in the opinion of the Board of Guardians of the said Union, required revision, among which was set out the property of the Harbour Commissioners which was thereupon transferred from the list of premises of a public nature to the list of rateable hereditaments. Within twenty-eight days after the receipt of such revised lists by the Clerk of the Sligo Union, the Harbour Commissioners being aggrieved by the valuation of their property, delivered to the Clerk of the Sligo Union a notice objecting to the revised valuation on the ground that the revenue and property so valued was of a public nature, and should be distinguished as such in the Valuation Lists as being exempt from taxation. The

(1) Sect. 116—All principal money borrowed by the Commissioners shall be applied by them in deepening and improving the said port and harbour, and in erecting and improving the several quays, wharfs, docks, and other conveniences, and for carrying into execution the several other intents and purposes of this Act relating thereto.

Sect. 117—All money to be received or collected by the Commissioners from rates and dues, and all revenue of the Commissioners coming to them by virtue of this Act, shall be applied—First, in payment of the working and establishment expenses of the Commissioners; secondly, in paying the interest on moneys borrowed by the Commissioners; thirdly, in providing the requisite annual instalments or appropriations for paying off the principal thereof; fourthly, in maintaining the works of the Commissioners, and generally in improving the port and harbour.

Appeal. 1898.

COMMR. OF VALUATION v. SLIGO HARB. COMMRS.

Commissioner of Valuation declined to alter the valuation, and the Harbour Commissioners appealed to Quarter Sessions for Sligo. The case was argued before the County Court Judge, who allowed the appeal, but at the request of counsel for the Commissioner of Valuation stated a case for the decision of the Queen's Bench Division.

In the Queen's Bench Division, counsel for the Commissioner of Valuation admitted that the case was undistinguishable from the *Belfast Harbour Case* (1), and explained that the case had been stated in order to obtain the decision of the Court of Appeal under 60 Vict. c. 17. The Queen's Bench accordingly, without argument, affirmed the decision of the Chairman of Quarter Sessions, and the Commissioner of Valuation appealed.

Henry, Q.C., and *J. F. Vesey Fitz Gerald*, for the appellant:—A harbour cannot be said to be dedicated to public purposes; it is only used by a particular portion of the public. Moreover, harbour works, if the harbour turned out a success, would bring in a profit to those who constructed them. The right of any persons to use it is not as members of the public, but because they pay dues: *Birkenhead Docks Case* (2); *Tyne Commissioners* v. *Chirton* (3). That distinguishes this case from the *Londonderry Bridge Case* (4), where the ultimate trust of the tolls was the abolition of tolls on the bridge altogether, so as to render the bridge free to the public. Moreover, the section of the public who would use a harbour is limited compared with those who would use a highway, and a harbour is not a highway.

The Valuation Acts were not passed for the purpose of imposing fresh burdens; but the General Valuation Act, 9 & 10 Vict. c. 110, was passed because it was found that the different Unions had different principles for Poor Law valuation. Then came 15 & 16 Vict. c. 63, ss. 16, 17; and 17 Vict. c. 8, s. 2. This latter section does not use the words "public purposes," but "of a public nature and occupied for the public service." Morris, J., held that this merely translated the judgment of the House of Lords in the *Mersey Docks Case* (5). That case decided that public purposes

(1) [1897] 2 I. R. 516.
(2) 2 El. & Bl. 148.
(3) 1 E. & E. 516.
(4) I. R. 2 C. L. 577.
(5) 11 H. L. Cas. 443.

can only mean user for the Crown, or by the servants of the Crown, and cannot be applied to works constructed by private enterprise and for private profit.

This case comes before the Court on the construction of the Valuation Act, and the *Londonderry Bridge Case* (1) was a decision on the Poor Law Code. It is said by the respondents that there is a difference between the words used in sect. 63 of the Poor Law Act of 1838 and the Valuation Acts; but the rating is exactly the same under the two codes, and the statutes must be construed in the same way.

This is not a case in which a decision of the Exchequer Chamber is binding on the Court of Appeal, if this Court should consider there is sufficient reason for overruling it: *per* Lord Justice Cotton in *Mills* v. *Jennings* (2). See also *Smith's Case* (3); *Brown* v. *Buchanan* (4).

G. Fetherstonhaugh, and *Ronan*, *Q.C.* (with them, *Gordon*, *Q.C.*), for the Sligo Harbour Commissioners:—

The statutes which regulate the harbour of Sligo do not contemplate any profit accruing to the Commissioners; the Commissioners who carry it on derive no benefit from it; they simply work the harbour for the benefit of the public. If the prosperity of the port increased, the tolls would sink down almost to nothing. There is no such provision in the Belfast Harbour Act. The words of the section, we submit, mean, "occupied for the benefit of the public." There is a difference between the words in section 63 of the Poor Law Act of 1838 and those in the Valuation Acts; in the former the words are "dedicated to or used for public purposes," and in the latter the words are "of a public nature." It cannot be denied that this harbour is of a public nature. The case is governed by the *Londonderry Bridge Case* (1) and by *Belfast Harbour Commissioners* v. *Commissioner of Valuation* (5). The *Mersey Docks Case* (6) does not apply, as there were no words of exemption in the statute there like those in the present case, and it was

(1) I. R. 2 C. L. 577.
(2) 13 Ch. D. 648.
(3) 11 Ch. D. 579.
(4) [1894] 2 I. R. 334.
(5) [1897] 2 I. R. 516.
(6) 11 H. L. Cas. 443.

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held there that the only party exempted was the Crown. But there may be an occupation of premises for public purposes, which has no connection with the Government of the country, or the Crown.

Secondly, we submit that this Court ought not to overrule the decision of the Exchequer Chamber in the *Londonderry Bridge Case* (1)—a Court of co-ordinate jurisdiction with the Court of Appeal. On the strength of that decision being correct, thousands of pounds have been invested in works in Ireland during the course of thirty years. The Courts are always careful not to overrule decisions which have stood for a long time, and which are not manifestly erroneous: *Pugh* v. *Golden Bridge Co.* (2).

June 30.

LORD ASHBOURNE, C.:—

This case comes before us on appeal from an order of the Queen's Bench Division on a case stated, and raises the important question whether the lands, tenements, hereditaments, property and revenue of the Sligo Harbour Commissioners are of a public nature, and should have been so distinguished in the Valuation Lists, and not liable to be rated for the purposes of taxation.

Previously to the year 1895 this property had been so distinguished in the Valuation Lists, but shortly after that the Commissioner of Valuation made the serious change objected to. Hence the case stated, and this appeal.

The Queen's Bench Division in this case were bound by their decision in the *Belfast Harbour Commissioners* v. *The Commissioner of Valuation* (3) which may be taken for all purposes as identical. In the *Belfast Case* (3) the Queen's Bench Division held—Mr. Justice Madden dissenting—that it was bound by the judgment of the Exchequer Chamber in the *Londonderry Bridge Case* (1) to refuse to apply to the Irish Valuation Acts the rule of construction afforded by the decision on the 43 Eliz. c. 2, of the House of Lords in the *Mersey Docks Trustees* v. *Cameron* (4)—that the property of the Belfast Harbour Commissioners must be held to be "dedicated to or used for public purposes," and within the exemption of the

(1) I. R. 2 C. L. 577.
(2) 15 Ch. D. 330.
(3) [1897] 2 I. R. 516.
(4) 11 H. L. Cas. 443

Valuation Acts, as interpreted by the *Londonderry Bridge Case* (1).

There are differences between section 63 of the Poor Law Act and the sections of the Valuation Acts here relied on; and the *Londonderry Case* (1) was founded on the interpretation of the former. But incidentally the construction of the Valuation Acts was discussed and decided.

Section 63 of the Poor Law Act provides that "no church, chapel, or other building exclusively dedicated to religious worship, or exclusively used for the education of the poor, nor any burial ground, nor any infirmary, hospital, charity school, or other building used exclusively for charitable purposes, or any building, land, or hereditament, dedicated to or used for public purposes, shall be rated."

The Valuation Acts follow up and develop this line of exemption. The General Tenement Valuation Act (9 & 10 Vict. c. 110) provides that the Commissioner of Valuation shall distinguish all tenancies "of a public nature or used for charitable purposes" which shall be exempt from assessment as long as they shall continue to be altogether of a public nature or used exclusively for charitable purposes.

The Amending Act (15 & 16 Vict. c. 63) contains similar provisions, whilst the further Amending Act (17 Vict. c. 8, s. 2) exempts hereditaments and premises "of a public nature and occupied for the public service."

The English statute—to which the English authorities are mainly directed—is 43 Eliz. c. 2. It contains no exemptions like those in the Irish statutes. To use the words of the Lord Chancellor in the *Mersey Docks Case* (2):—"The only occupier excluded from the operation of the Act is the Sovereign—because he is not named in the statute; and the direct and immediate servants of the Crown, whose occupation is the occupation of the Crown itself, also come within the exemption."

The facts of the *Derry Case* (1) have been frequently stated in the arguments of this case. It appears that under the Londonderry Bridge Act, a Board of Commissioners was constituted with power to lend money, to be applied in the construction of a bridge.

(1) I. R. 2 C. L. 577. (2) 11 H. L. Cas. 443.

Appeal. 1898. COMMR. OF VALUATION v. SLIGO HARB. COMMRS. Lord Ashbourne, C.

The Act empowered the Commissioners, when the bridge should be completed, to erect toll-houses and take tolls, and directed the tolls to be applied, after payment of costs and of an annual sum to the Irish Society, in payment of the interest on money borrowed under the Act, and that the residue of the tolls should from time to time be invested and applied in forming a sinking fund for the annual expenses connected with the bridge tolls, to the end that it might become toll-free.

In the *Derry Case* (1) the Commissioner of Valuation urged that the decision of the House of Lords in the case of the *Mersey Docks Trustees* v. *Cameron* (2) governed the case, and should be applied; and that the words of section 2 of 17 Vict. c. 8, mentioning that the premises should be "occupied for the public service" were in entire accord with that great authority.

Everything was fully discussed in the *Derry Case* (1)—the difference between the Irish Poor Law Act of 1838 and the English Act of 43 Eliz. c. 2; the language of the Irish Valuation Acts; the English decisions before the *Mersey Docks Case* (2); and that case itself.

The majority of the Exchequer Chamber decided against the contention of the Commissioner of Valuation in the *Derry Case* (1), and Mr. Justice O'Hagan at the close of his judgment uses these words:—"I repeat that in my mind the *Mersey Docks Case* (2) has no bearing upon the case before us, because it can supply no common rule of construction to a statute from which exempting words are absent, and another in which their presence is plain and undeniable; and because the ground of decision as to the first has no existence as to the second. I am unable to conceive how a judgment which rests apparently on the exclusion from the English Act of any reference to public purposes, can compel us to put a strained and unnatural meaning on the plain language of our Poor Law, or rather to ignore it altogether; and when it makes dedication to such purposes the ground and the measure of exemption, I think we are bound to abide by our statute law and our own continuous practice." The judgment of Mr. Justice O'Hagan was supported by the high sanction of Baron Fitz Gerald, Chief

(1) I. R. 2 C. L. 577. (2) 11 H. L. Cas. 443.

Baron Pigot, and Chief Justice Monahan. It is true that there was a powerful minority in the Court of Exchequer Chamber, but the decision of that great Court was against the Commissioner of Valuation, and he acquiesced in the decision. He could have appealed to the House of Lords, but he never sought to do so. That decision was given thirty years ago. It has ever since been the recognised law in Ireland. It has the same place in the law of Ireland that the *Mersey Docks Case* (1) has in the law of England. The Legislature deliberately used in the Irish Acts the expressions "public purposes" and "public nature" which were then current and familiar in English cases, and if a change is now thought expedient on public grounds, the Legislature must itself interfere. At present in England and in Ireland, the laws on this subject are different, and the decisions are different, but I do not think that this Court has the mission or the right to seek to gain uniformity by taking upon itself to overrule the decision of the Irish Court of Exchequer Chamber in the construction of Irish statutes, and supported for thirty years by uniform Irish practice.

I can quite appreciate the difficulties which acted in the minds of the dissentient members of that Court, but that is no reason why I should, after the lapse of a generation, apply myself to question the decision of a great Irish Court of co-ordinate authority.

The order of the Queen's Bench Division will therefore be affirmed, and the appeal dismissed with costs.

FITZGIBBON, L. J.:—

My opinion is adverse to the appellant upon both the principal points argued before us. I hold that we should follow the decision of the Exchequer Chamber in *The Londonderry Bridge Case* (2), and that it rules the present case; and I hold further, that that decision was right.

The Londonderry Bridge Case (2) was decided by a Court whose jurisdiction has been transferred to us. For thirty years it has been the law in Ireland, so far as the Exchequer Chamber then could, or this Court now can, declare or make law. It lays

(1) 11 H. L. Cas. 443. (2) I. R. 2 C. L. 577.

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down, in the words of FitzGerald, J., in *The Limerick Case* (1), "that there may be a public purpose, and an occupation for the public service, which has no connexion with the service of the government of the country, and which exempts the premises from taxation." Property may be excluded from that principle, as the Limerick Gas Works and the Glasnevin Cemetery have been excluded, as not being used for a public purpose, but the Sligo Harbour can not be distinguished from the Londonderry Bridge upon that ground, and the decision of the Exchequer Chamber has been left untouched by Parliament, and has been recognised and acted upon throughout Ireland, since 1867. The Dublin Port and Docks, the Belfast Harbour (2), and a vast amount of similar property has been dealt with on the faith of that decision. The first Act upon which the question depends was passed sixty years ago (1 & 2 Vict. c. 56, s. 63). The subject has been directly dealt with by the Valuation Acts of 1852, and of 1854, and several Valuation Acts and Rating Acts have been passed since those Acts. Besides all these, a number of Local Acts, including the Act of 1869, which incorporated the Sligo Harbour Commissioners, and so created the property now in question, and the amending Act of 1877, have been passed by the Legislature, since the decision, and presumably with full knowledge and on the faith of it. Under such circumstances, I cannot hold either that we can reverse the decision of the Court of which this Court is only the continuation or the successor, or disturb a principle which must be assumed to have been known to the Legislature, and to have been acted upon by it, as well as by others, in reference to, amongst others, the very same property which it is now sought to deprive of the exemption conferred by the law as declared by the Exchequer Chamber.

If I were at liberty to review it, I should hold that the principle of that decision was right. I shall add to the volume of the judgments to that effect only a condensed statement of the reasons for my judgment. For a full and entirely satisfactory statement of the arguments which have led me to my conclusion, I respectfully refer to and adopt the judgment of O'Hagan, J.,

(1) I. R. 6 C. L. 432. (2) [1897] 2 I. R. 516.

in *The Londonderry Bridge Case* (1). The principle of exemption in the English legislation is exemption by silence. The earlier decisions have been corrected by the House of Lords, which has now laid down that Crown Property, properly so called, alone is exempt, and that it is exempted only because the Crown is not affected by the Rating Acts, and that only because the Crown is not mentioned. The principle of exemption in Ireland, on the contrary, is exemption by express enactment. Crown property, properly so called, is exempt in Ireland, as it is in England, upon the same ground of prerogative. But I have heard no intelligible explanation of how any effect is given to the Irish express exemption of public property, if those words are limited to the same property which is exempted in England because the English Acts do not mention the Crown at all. The absence of all or any words being the ground of the English decisions, these decisions can have no bearing on the interpretation of the words which are present in the Irish Acts.

If public purposes include anything more than Crown purposes, the question remains whether they include the purposes of the Sligo Harbour. The original Act of 1838 indicates the meaning of public purposes, by contrasting the exempted premises from those, "where any *private profit or use* is directly derived therefrom," in which case the person deriving such profit or use is made liable to be rated as an occupier according to the annual value of such profit or use. I cannot hold that any private profit or use is derived by the Commissioners from the Sligo Harbour.

The purpose of the Valuation Code, as declared in the preamble of the Act of 1852, is "to make one uniform valuation of lands and tenements in Ireland, which may be used for all public and local assessments and other rating." Sect. 2 provides that this valuation shall, subject to correction and revision, be used and be in force as well for all County assessments or Grand Jury rates, or city, town, or parish rates, as for Poor Law assessments and rates. Sect. 15, now repealed, required the Commissioner of Valuation to distinguish "hereditaments of a public nature," and

(1) I. R. 2 C. L. 577.

Appeal. 1898. COMMR. OF VALUATION *v.* SLIGO HARB. COMMRS. Fitz Gibbon, L.J.

declared them to be exempt from assessment so long as they should continue to be of a public nature. *Prima facie*, the scope of this section ought to be co-extensive with that of the exemptions in the Act of 1838, sect. 63, and I cannot read the words used in 1852 as meaning anything more or less than the words used in 1838. But even if the limits of the exemption be altered, the scope of the alteration must still be ascertained; we must still see what is meant by "hereditaments of a public nature," and we must still find something upon which this express exemption is to operate, other than Crown property, which is exempted upon the ground of prerogative. The same principle applies to the Valuation Amendment Act, 1854. It repeats *verbatim* the words of 1852, but it adds a limitation of the continuance of the exemption, by the words "*so long as* they shall continue to be *occupied for the public service*." Hereditaments of a public nature, either in the strict or the popular sense, such for example as a disused barrack, or an empty Crown building, or a *quasi* public hereditament, exempted as being of a public nature, might no longer be required for the public service, and might pass into the occupation, temporary or otherwise, of a private person. A workhouse, for example, might become a factory. In such a case the exemption would cease, and the amendment would operate. But the word "public" is still the word used, and the word to be interpreted. It must have the same meaning as applied to "service," which it has as applied to "nature," or to "purposes," and in all these cases it must extend to something more than Crown property, or the express legislation, as well the original legislation as the amendments of it, must be deprived of all effect, or rather, the effect of enacting must be exactly the same as that of leaving out. I cannot follow the attempts to exclude hereditaments otherwise public, upon distinctions as to the mode of raising the capital expended upon them, or as to the mode of applying an ultimate, but as yet unattained, surplus revenue, so long as no private profit or use is (in the words of the Act of 1838) "derived therefrom." But in any case, the Sligo Harbour Acts exclude any private use of any such surplus, if it were realised; and the Sligo Harbour is open to use by all Her Majesty's subjects desiring to exercise the public right of navigation, exactly in the same sense in which the Londonderry

Bridge was open to those who desired to exercise the right of using a public highway. In both cases, the right exercised is public, though each member of the public who exercises it must pay a toll for so doing. If we are to determine the application of the word "public," by the ordinary or popular meaning of the word, as meaning anything more than "State," or "Crown," Mr. Ronan has supplied us with an ingenious and persuasive proof that the Sligo Harbour is exempt, by showing that the learned Lords who tried to describe the class of property which had been wrongly relieved from taxation, through assuming that anything was to be exempted in England which was not protected by the prerogative of the Crown, described that property in the very words "property of a public nature," or property "used or occupied for public purposes," which the Irish Acts have employed in expressly defining what is to be distinguished by the Commissioner of Valuation in Ireland, and to be exempted in this country.

WALKER, L.J.:—

I concur that the appeal should be dismissed, but I do not wish to rest my concurrence on the assumption that *The Londonderry Bridge Case* (1) was a decision which I could concur in, if I considered the point open.

In my opinion sufficient weight was not given in that case in the judgment of the majority to the special language of the 17 Vict. c. 8. In fact Lord O'Hagan was the only one on that side who entered into a consideration of those Acts. Still I concur with Mr. Justice Gibson that *The Londonderry Bridge Case* (1) must be treated as a decision on the Valuation Acts, and I may say here that I concur in almost every word of Mr. Justice Gibson's judgment (2).

The way in which I should have been disposed to regard the case is this: I concur with Mr. Ronan that the decision in *The Mersey Docks Case* (3) was not founded upon the construction of any clauses of exemption such as we have in our code, but on the doctrine that the Crown was not bound by the Act of Elizabeth, and therefore though every occupier was bound to pay rates,

(1) I. R. 2 C. L. 577. (2) [1897] 2 I. R. 528. (3) 11 H. L. Cas. 443.

Appeal. 1898.

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those who occupied as representing the Crown, in the large sense in which that is interpreted by decision, were exempt. This includes all the Crown's servants in the various departments attached to the service of the State.

In our code we have exempting clauses, and the question is their true construction. If the only question we had to consider was the true construction of the 63rd section of the Act of 1838, I am not at all prepared to say that the decision in *The Londonderry Bridge Case* (1) was not right; but the subsequent legislation is progressive. We have the first advance in the Act of 1852, where the words used are "hereditaments of a public nature," and there is a provision that they must be "altogether of a public nature." We have not even to construe those words, because the Act of 1854 recites that it was expedient to amend the former Act, and the amendment runs "shall distinguish all hereditaments of a public nature; and all such hereditaments or tenements or portions of the same shall, so long as they shall continue to be of a public nature and occupied for the public service, be deemed exempt, &c."

I cannot think if this matter were *res integra* that an answer to this case that the hereditaments are of a public nature and occupied for the public service truly describes the property in the ordinary sense of the words, and I think with Mr. Justice Gibson that they more aptly describe governmental purposes, and were used for the purpose of clearing up difficulties which might arise on the use of the words "used for public purposes," or "of a public nature," else why amend the previous legislation at all. But then we are asked to review a decision of the Exchequer Chamber, a Court of co-ordinate authority with us. It is thirty years old. I am precluded from saying it was clearly wrong by the fact that my colleagues think it was right, and I am obliged to rely against their opinions on my individual view. It could have been brought to the House of Lords and it was not, and since it was made enormous sums must have been lent to harbour authorities, and large improvements made in harbours on the faith of it.

(1) I. R. 2 C. L. 577.

We have been told a contrary decision would mean to the Harbour of Sligo £2000 per annum, and to the Harbour of Belfast more than three times that, and trade has grown on the faith of the freedom from rates.

Considering, therefore, that exemption or liability in Ireland depends on the the construction of clauses at best obscure, and that our Valuation code is one peculiar to this country, now long acted on in the sense which will exempt Harbour Boards, I think if such a radical change is to be made it should be by legislation, under which vested interests may be had regard to, and protected.

I agree, therefore, that the appeal should be dismissed.

HOLMES, L.J.:—

I am of opinion that the words "building, land and hereditament dedicated to or used for public purposes" in the 63rd section of the Irish Poor Law Act of 1838, and the words "Hereditaments of a public nature" in the 2nd section of the Irish Valuation Act, 1854, mean the same thing. The words in the later Act, if they stood alone, would seem to be wider than those in the previous statute; but they are followed in the same section by the words "so long as they shall continue to be of a public nature and occupied for the public service."

Taking together both branches of the clause, and bearing in mind that the two sections, being still in force, and forming part of the same code, ought, if possible, to be read in harmony, I do not hesitate to give them an identical construction. In coming to this conclusion, I do not overlook the point that "occupied for the public service" is capable of bearing a comparatively narrow meaning. The words "public service" are often used as equivalent to "the service of the State." But I think that it would be unreasonable to so interpret them, when I find them used in immediate connection with the words "of a public nature," and in a connection more remote but still very close with the words "dedicated to and used for public purposes."

Two conclusions follow from the foregoing propositions. The first is that *The Mersey Docks Cases* (1) are not only no authorities

(1) 11 H. L. Cas. 443.

Appeal. 1898. COMMR. OF VALUATION *v.* SLIGO HARB. COMMRS. Holmes, L.J.

on the question before the Court, but they give no real help in deciding it. They are conversant with a statute containing no exemption from rating by reason of hereditaments being used or occupied for public purposes. The sole ground of exemption relied on was that the Crown was not bound by the rating enactment, and that therefore all lands occupied either actually or constructively by the Sovereign were exempt. But it is obvious that whatever latitude of application is given to this class of exemption, it must fall far short of an exemption founded on dedication to, or use for, public purposes.

The second conclusion is that *The Guardians of the Londonderry Union* v. *The Londonderry Bridge Commissioners* (1) is an authority precisely in point. The true ground of the judgment in that case was that a bridge, open as of right to every member of the public, on payment of a toll, which toll could only be used for the benefit of the public in connection with the bridge itself, and could never be the source of private profit, was dedicated to, or used for, public purposes. The fact that the bridge might, and probably would, ultimately become toll free, was a legitimate argument to show that the purpose of the user was wholly public, but in no other way was relevant to the decision. The case was so understood at the time; and it has been acted on in this sense since. There could have been an appeal to the House of Lords; but the plaintiffs accepted the adverse judgment, and as a consequence all such property as that of the Sligo Harbour Commissioners has been since exempted from rates. On the faith of the law thus laid down, public bodies have borrowed and expended immense sums of money for thirty years; and it is impossible to ascertain to what loss innocent lenders might be subjected, if that decision were now overruled.

The Court of Exchequer Chamber was a Court of co-ordinate jurisdiction with the present Court of Appeal; and without going so far as to lay down that this Court is bound in every case to accept its judgments as binding, I am clearly of opinion that we are not at liberty to overrule its decision in *The Londonderry Bridge Case* (1). For this reason, even if I did not agree with

(1) I. R. 2 C. L. 577.

the conclusion there arrived at, I should feel bound to follow it, but I desire to add that the result of my consideration is that I see no reason to doubt its soundness.

Solicitor for the Commissioner of Valuation: *Sir Patrick Coll.*
Solicitor for the Sligo Harbour Commissioners: *Fenton.*

R. D. M.

DOODY AND OTHERS, TENANTS; W. H. JONES WESTBY, LANDLORD (1).

Land Com. 1898. Nov. 29.

Landlord and tenant—Land Law (Ireland) Acts, 1881-1896—*Fair rent—Improvements—Board of Works loan.*

A landlord, at the request of his tenants, borrowed from the Board of Works money which was expended by the tenants in making drains; and they paid him, during the period required for the repayment of the loan, not only the interest payable to the Board of Works, but also a sum equivalent to the sinking fund, till the entire was repaid:—

Held, that the improvements were tenants' improvements.

THIS was an appeal from an order of a Sub-Commission Court. The facts are set out in the judgment.

T. M. Healy, for the tenants.

Wakely, for the landlord.

MEREDITH, J.:—

During the hearing of the appeals on this estate, a question of importance and interest arose. The landlord, at the request of the tenants (as we inferred), borrowed money from the Board of Works, and an arrangement was made between the landlord and the tenants to this effect:—the money was to be expended by the tenants in making drains upon their respective holdings, and the

(1) Before MEREDITH, J., and the Hon. GERALD FITZGERALD, Q.C., Commr.

Land Com. 1898. — Doody, *Tenant*; Westby, *Landlord.* — Meredith, J.

tenants were half year by half year, during the full period required for the repayment of the loan, to pay to the landlord, not merely the interest payable to the Board of Works, but also a sum equivalent to the sinking fund; that is to say, half year by half year the tenants were to pay, and as a fact paid, to the landlord the entire amount of the instalments, principal and interest, which the landlord paid to the Board of Works. At the expiration of the period the landlord was in this position, that though he had pledged his credit and the credit of his estate for the amounts so lent by the Board of Works, he had not sustained the loss of a farthing; every penny of the loan having been repaid by the tenants, through the landlord, to the Board of Works. Now, under these circumstances, it was contended on behalf of the landlord that the improvements effected upon the holdings by means of the Board of Works loan were landlord's improvements, and that the landlord was entitled to rent in respect of them, and that the tenant was not entitled to be exempted from rent in respect of such improvements. It was stated by the solicitor, who instructed Mr. Wakely for the landlord, that Mr. Justice Bewley had decided the identical question under consideration in a case upon the estate of Mr. Pack-Beresford, and that the learned Judge held that the tenant was not entitled to exemption from rent on the improvements. I had the files brought from the office and investigated, and I can find no trace of such a decision. In some of the cases on the Pack-Beresford estate I ascertained that this had occurred:—the landlord had borrowed money from the Board of Works, and he had lent money to the tenants under an agreement by which the tenants were to pay 5 per cent. interest to the landlord. It seems to me that these are essentially different cases to the cases before the Court, because there can be no question that in all honesty, fairplay, and justice, the tenants here repaid the principal and interest, and the landlord never paid one penny. If tenant and landlord choose to make an agreement by which the landlord lends money at interest, and interest only, and there is no arrangement for paying off, by contribution to a sinking fund or otherwise, the principal money advanced by the landlord, the case stands in a different position to that in which the present case stands. As it was stated that Mr. Justice

Bewley had decided this point, I thought it only respectful to that learned Judge to ask him, whether he had in any case laid down as a principle, or decided, that tenants situated as are the present tenants, were not entitled to an exemption from rent in respect of improvements. The learned Judge has informed me, exactly as I expected, that, so far as his recollection goes, he never decided anything of the kind. Accordingly, I feel perfectly free to decide the case for myself, and I hold that the tenants in the present case are entitled to have the improvements in question regarded as tenants' improvements; they were made upon the holding by the tenants, they were made in truth and in fact with the tenants' money, and the landlord has neither paid nor compensated the tenants in respect of any of these improvements.

Solicitor for the tenants: *W. M. Byrne.*
Solicitor for the landlord: *C. R. Thorp.*

W. C. S.

Q. B. Div.
1899.
Jan. 19.

BROWN AND M'COURT *v.* FAY (1).

(1898. No. 18,439.)

Practice—Remittal to County Court—Slander—Justification.

The Court will not, when remitting an action for a slander, charging the plaintiffs with an indictable offence, put the defendants on terms not to plead justification in the County Court.

MOTION on behalf of the defendant to remit this action for hearing before the Recorder of Belfast.

The action was one brought to recover damages for an alleged slander. The defendant was a coal merchant, and the plaintiff had formerly been in his employment. The slander complained of was a statement alleged to have been made by the defendant that the plaintiff had "made away" with a document belonging to the defendant.

Bartley, for the defendant, in support of the application.

W. H. Brown, for the plaintiffs:—

The defendant should be put upon terms not to plead justification in the County Court: *Geoghegan* v. *Keegan* (2); *M'Gingan* v. *O'Brien* (3).

MURPHY, J.:—

It is not now the practice of the Court to impose any such terms, when remitting an action of slander. We will remit the case without imposing any terms.

KENNY, J., concurred.

Solicitors for the plaintiffs: *Moorehead & Wood.*
Solicitor for the defendant: *W. B. Galway.*

J. M'G.

(1) Before MURPHY and KENNY, JJ. (2) I. R. 11 C. L. 129.
(3) 19 I. L. T. R. 30.

JOHNSTON *v.* STODDART (1).

(1898. No. 18,973.)

Q. B. Div. 1899. Jan. 20.

Order of Court of Appeal giving leave to serve writ out of jurisdiction—Motion to set aside order—Where application should be made.

Where the Court of Appeal makes an order *ex parte*, giving the plaintiff leave to issue and serve a writ out of the jurisdiction, an application to set that order aside is properly made to the Divisional Court.

MOTION on behalf of the defendant to set aside an order of the Court of Appeal, made *ex parte* on the 15th December, 1898, giving liberty to issue and serve the defendant with a writ of summons in this action out of the jurisdiction.

The plaintiff, having been refused on an *ex parte* application to the Queen's Bench Division, leave to issue and serve a writ out of the jurisdiction, appealed *ex parte* to the Court of Appeal. The Court of Appeal reversed the decision of the Queen's Bench Division, and made an order giving the plaintiff leave to issue and serve the writ out of the jurisdiction. The defendant now moved to set that order aside upon affidavits filed.

R. F. Harrison, for the defendant:—

The application is rightly made to the Court in which the action is: *Boyle* v. *Sacker* (2); *Field* v. *Bennett* (3).

O'Rorke, for the plaintiff, did not contest the point.

THE COURT held, that the application was rightly made to them, and heard the motion.

Solicitors for the plaintiff: *D. O'Rorke & Son.*
Solicitor for the defendant: *Randall A. Howe.* J. M'G.

(1) Before MURPHY and KENNY, JJ. (2) 39 Ch. D. 249.
(3) 56 L. J. (N. S.) Q. B. 89.

Q. B. Div. 1899. Jan. 26, 30. Feb. 1, 4.

ROBERT DAVIS WORKMAN, TRADING AS WORKMAN AND CO. *v.* THE BELFAST HARBOUR COMMISSIONERS (1).

(1898. No. 18,110.)

Contract containing arbitration clause—Action—Motion to stay the action on the ground that the matters in dispute come within the arbitration clause—Common Law Procedure Act (Ireland), 1856, s. 14—Fraud—Construction of contract.

On a motion to stay an action, on the ground that the matters in dispute come within a clause in a contract for the execution of works agreeing to refer matters in dispute, arising in the settlement of the accounts, to arbitration, the construction of the clause is for the Court. The Court will not stay the action, where it is of opinion:—(1) That the plaintiff is suing upon substantial and *bona fide* causes of action, which do not come within the clause; or (2), That there are serious and difficult questions of law involved in the action, not proper to be submitted to the determination of an arbitrator; or (3), That a cause of action based upon fraud, actual or constructive, is *bona fide* sued upon; or (4), That, in the exercise of its judicial discretion, it ought not to refer the matters in dispute to arbitration.

Moyers v. *Soady* (18 L. R. Ir. 499) and *Vawdrey* v. *Simpson* ([1896] 1 Ch. 166) followed.

MOTION on behalf of the defendants for an order pursuant to the 14th section of the Common Law Procedure (Ireland) Act, 1856, that all proceedings in this action may be stayed, and that all matters in dispute therein be referred to the arbitration and decision of W. H. Preece, the President of the Institution of Civil Engineers, in accordance with the memorandum of agreement dated the 1st October, 1895, between the plaintiff and defendants, and that the said agreement be received and made a rule of Court.

On the 1st October, 1895, the plaintiff entered into a contract with the defendants to do certain work for them, in connexion with their "New Branch Dock," for a stipulated sum. The plain-

(1) Before BOYD and KENNY, JJ.

tiff completed the works and handed them over to the defendants on the 1st November, 1897. He subsequently sent in a claim for £49,285 9*s.* 6*d.* over and above the contract price agreed upon. The defendants, save as to a sum of £1700, disputed this claim, and put forward a counterclaim amounting to £10,000 for penalties for delay and other matters. The defendants, besides putting forward this counterclaim, contended that all the matters in dispute between them and the plaintiff should be referred to arbitration, pursuant to clause 14 of the contract, which was as follows:—"14. The mode of execution and the workmanship and materials shall be to the entire satisfaction of the engineer of the Commissioners, who shall have power to place an inspector over each department of the works. If any dispute or difference shall arise between the commissioners and the contractor, during the progress of the works with reference to the meaning of the contract, or as to the execution of the works, or as to the quality of the materials used, or the execution of any alleged extras, or the materials used in the execution thereof, or as to the amount or value of the said alleged extras, or of the deductions to be made by reason of any alterations or omissions, or otherwise in any way relating to the premises, the same shall be referred to, and shall be decided by, the engineer; but, after the completion of the works all disputes and differences between the parties arising in the settlement of the accounts shall be referred to the President for the time being of the Institution of Civil Engineers, whose decision shall be final and binding on all parties." The plaintiff contended that the bulk of his claim was on foot of causes of action, which were outside this clause, but, expressed his willingness to submit to arbitration under a submission giving a more extended reference. The defendants refused to accept the more extended reference offered by the plaintiff. The plaintiff then issued the writ in this action in the month of Dec., 1898, claiming the above-mentioned sum of £49,285 9*s.* 6*d.* for extras, and as damages for breaches of contract, breach of warranty, negligence and fraudulent concealment of material facts by the defendants, and for the defendants' wrongful obstruction of the plaintiff, in the course of carrying out the contract. The defendants moved to stay the action pursuant to the above notice. The facts and circumstances giving rise to the plaintiff's

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claim and this action are fully set out in the judgment of Mr. Justice Kenny.

The Attorney-General (*The Right Hon. John Atkinson, Q.C.*), and *Gordon, Q.C.* (*Campbell, Q.C.*, and *Bates*, with them) for the defendants:—

The action should be stayed. All the causes of action come within the clause of reference and are capable of being referred. The claim for fraud is not *bona fide*, and is introduced merely to oust the jurisdiction of the Court. This is shown by the conduct of the plaintiff and the correspondence. As regards the claim based upon the extra work caused by the existence of the pipe, this was merely extra labour in doing the work contracted to be done. Besides the principle of *caveat emptor* applies. We did not warrant our plans. The contractor must take his chance. The last part of the clause as to reference cannot mean that there is to be merely a totting of items. It must mean that you can refer the grounds upon which they are to be allowed or disallowed. The counter-claim for penalties can be referred, although it may raise the question as to whether the contract has been carried out in time. If the questions are wholly disconnected with the contract, they cannot be referred to arbitration. [They cited the following cases: *Thorn* v. *Mayor and Commonalty of London* (1); *Russell* v. *Russell* (2); *Willesford* v. *Watson* (3); *Piercy* v. *Young* (4); *Turnock* v. *Sartoris* (5); *Harrison and Another* v. *Lay* (6); *Imhof and Another* v. *Sutton* (7); *Thorburn* v. *Barnes* (8); *Russell* v. *Pellegrini* (9); *Seligmann* v. *Le Boutillier* (10); *Randegger* v. *Holmes and Others* (11); *In re Hohenzollern Actien Gesellschaft and the Contract Corporation* (12); *Walmsley* v. *White* (13); *Renshaw* v. *Queen Anne Residential Mansions and Hotel Company Limited* (14); *Forwood* v. *Watney and Another* (15).]

(1) 1 A. C. 120.
(2) 14 Ch. D. 471.
(3) L. R. 8 Ch. App. 473.
(4) 14 Ch. D. 200, 208.
(5) 43 Ch. D. 150.
(6) 13 C. B. (N. S.) 528.
(7) L. R. 2 C. P. 406.
(8) *Ibid.* 384.
(9) 6 E. & B. 1020.
(10) L. R. 1 C. P. 681.
(11) *Ibid.* 679.
(12) 54 L. T. (N. S.) 596.
(13) 67 L. T. (N. S.) 433.
(14) [1897] 1 Q. B. 662.
(15) 49 L. J. (N. S.) Q. B. 447.

The Right Hon. The Mac Dermot, Q.C., and *Ronan*, Q.C. (*O'Shaughnessy*, Q.C., and *Hume*, with them), for the plaintiff:—

The defendants themselves refused to refer the matters in dispute on the ground that they were outside the contract. There are substantial and *bona fide* questions in dispute between the parties outside the contract. The claim based upon fraud is *bona fide* and raises serious questions of law. Even if the matters are all within the clause as to arbitration, still the Court has a discretion. The Court must be satisfied that the matters not only may be referred, but must be referred, to arbitration. [They cited *Davis* v. *Starr* (1), *Moyers* v. *Soady* (2), *Lawson* v. *Wallasey Local Board* (3). BOYD, J., referred to *Vawdrey* v. *Simpson* (4). KENNY, J., referred to *Ives & Barker* v. *Willans* (5).]

Cur. adv. vult.

BOYD, J.:—

Feb. 4.

The application in this case to refer the matters in dispute is grounded on the provisions contained in the 14th clause of the general conditions contained in the tender which was sent in by the plaintiff for the execution of the works. That clause provides, in the first place, for the determination of disputes and differences which should arise during the progress of the works, and constitutes the engineer of the Commissioners the arbitrator in reference thereto, and it then proceeds:—"But, after the completion of the works, all disputes and differences between the parties arising in the settlement of the accounts shall be referred to the President for the time being of the Institution of Civil Engineers, whose decision shall be final and binding on all parties." Disputes of a very serious character have arisen in the present case between the parties. The plaintiff has alleged that owing to the existence of a 9-inch pipe from the river into ground which he had to excavate, and of the existence of which the defendants knew or ought to have known, and of which he was ignorant, very considerable extra expense was imposed on him. He also alleges that the

(1) 41 Ch. D. 242.
(2) 18 L. R. Ir. 499.
(3) 52 L. J. (N. S.) Q. B. 302.
(4) [1896] 1 Ch. 166.
(5) [1894] 2 Ch. 478.

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engineer of the defendants illegally applied tests to the cement procured by the plaintiff during the progress of the works, and owing to such tests he improperly rejected the cement so procured, and compelled the plaintiff to procure other and more expensive cement than was necessary under the conditions of the contract, In several other matters he alleges that he was delayed, hindered, and prevented during the execution of the works, and he claims damages in respect thereof. The main cause of the complaints made by the plaintiff is the existence of the pipe I have referred to. The excavations to be made by him, he alleges, were shown on the plans and specifications as in dry earth; but the existence of the pipe caused a flow of water into the works, and he charges the defendants with having concealed its existence, and he claims damages against the defendants for such concealment, and on various other grounds. It is no part of our duty on the present motion to decide whether the claims made by him are good and valid claims. If they were clearly illusory or sham claims we should be bound to disregard them. Having regard to the serious nature of the plaintiff's claims, and the grave questions of law which may arise thereon and on the claim of the defendants to make large deductions for penalties, I do not think we can disregard them and treat the case as if the only disputes existing between the parties are those "arising in the settlement of the accounts" within clause 14.

If it was intended that any legal rights which might arise between the parties should be submitted to arbitration, it should have been distinctly stated in the contract, and certainly clause 14 does not so state.

Throughout the whole correspondence it appears clearly that the plaintiff claimed that he had rights against the defendants, not provided for in clause 14, and insisted that any reference of his claims to arbitration should extend to these, and the plaintiff was always willing to refer his case to arbitration, provided that all his claims should be considered. With this view he, at the request of the defendants' solicitor, prepared a draft submission, and forwarded it to the defendants' solicitor, who retained it for some months without objecting to it.

I am of opinion that the matters in dispute between the parties

in this case are so important, and raise such difficult questions, that they should not be referred to arbitration under clause 14.

Very many cases have been cited during the arguments on this motion; but I think the judgments in the cases of *Moyers* v. *Soady* (1) and *Vawdrey* v. *Simpson* (2) correctly state the grounds which should guide us in this case, and I am of opinion the motion should be refused with costs.

KENNY, J.:—

This action is brought for recovery of a very substantial sum—£49,285 9*s.* 6*d.* in respect of extra work alleged to have been executed by the plaintiff in connexion with a contract he had entered into with defendants for the extension and alteration of one of their docks in Belfast. The action has proceeded no further than the writ of summons. The indorsement of claim on the latter claims the sum I have mentioned not only as "extras," but as damages for breaches of contract, negligence, warranty, fraudulent concealment, and wrongful obstruction of the plaintiff in the course of the contract. The causes of action for the "extras" and damages are not stated on the writ to be alternative or substitutional, though I think there is little doubt that they are so, having regard to the nature of the claim made by the plaintiff before action, which, in his accounts as furnished, he referred to as "extras," and beyond the amount of which he, throughout the correspondence with the defendants and their solicitors, made no demand. The defendants now move under the 14th section of the Common Law Procedure Act (Ireland), 1856, to stay the proceedings in this action, and that all matters in dispute between the plaintiff and defendants be referred to the arbitration of the President of the Institution of Civil Engineers, pursuant to an arbitration clause contained in the contract for the works entered into between the parties. It is to be noted that the "stay" applied for extends to the whole of the plaintiff's claim: so that it must be taken, as indeed it has been argued by the counsel for the defendants who last addressed us, that there is no part of the causes of action indorsed on the writ that is not captured by the

(1) 18 L. R. Ir. 499. (2) [1896] 1 Ch. 166.

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arbitration clause, and proper to be considered by the arbitrator. But it is argued for defendants that not only should all the plaintiff's claims be referred, but also the question of penalties, alleged to amount to over £10,000, in respect of which the defendants set up a cross demand. What we have to consider is whether the arbitration clause contemplates a reference of all these matters, and if it does, whether it is reasonable and proper that, under the circumstances, the action should be stayed.

I shall very shortly state the material facts. The contract is dated the 1st October, 1895, and it incorporates general conditions, maps, plans, and specifications. It provides for the execution of possible extras on a written order from the defendants' engineer; for the furnishing by the contractor of a weekly bill of such extras; and, in default thereof, for their being deemed to be abandoned; for the ascertainment of the value of such extras by the schedule of rates annexed to the contract; for payments to the contractor from time to time to the extent of ninety per cent. on the value of the work done; and for payment of the balance at the end of a year from completion, if the engineer shall then certify that the works have been properly executed and maintained. The special arbitration clause, after providing for the reference to, and decision by, the engineer of all disputes and differences arising during the progress of the works as to the meaning of the contract, or as to the execution of the works or extras, or their amount or value, or as to the quality of the materials, "or otherwise in any way relating to the premises," proceeds as follows:—"but after the completion of the works all disputes and differences between the parties arising in the settlement of the accounts shall be referred to the President for the time being of the Institution of Civil Engineers, whose decision shall be final and binding on all parties." The defendants say that the works should have been finished and handed over by the 5th June, 1896, but that they were not completed until subsequently to the 1st Nov., 1897, though the defendants accepted that date as the actual date of completion from which the twelve months' maintenance were to run. They claim penalties for the intervening period, and they still retain in their hands a considerable sum, representing the balance which they admit to be due on foot of the contract, and

which they were entitled to retain pending the expiration of the period of maintenance.

With regard to the works, the principal difference between the parties relates to the extension of what is known as the East wall of the Branch Dock. The contract provided for its being built "entirely dry or clear of water," but in the progress of the work it was found that at the base of the existing wall a pipe had been built through it which communicated with the river or lough, and which was the means of flooding the works and proving a great obstacle to building "in the dry." The plaintiff's claim in respect of additional work or loss caused by the necessary removal or stoppage of this pipe amounts to over £28,000, and in his affidavits made for the purpose of resisting this motion, he makes the double case (1) that this pipe was built in 1892, and that its existence was, or must have been, known to the defendants through their employés, and (2) that though he took the risk of having to remove all natural obstructions, the plans and specifications showed no indication of this pipe, and his contract price did not contemplate or cover artificial obstructions. On these alleged facts the plaintiff bases his claim for damages for fraudulent concealment and breach of warranty.

Another dispute which has developed a claim for damages for delaying the works, and a counter claim for penalties, arises in respect of the times at which the plaintiff obtained possession of the sites of the works. The works were to be done in sections—one particular site not to be entered on until the work on another had been finished—and the plaintiff alleges that when he was prepared to accept possession of one of the sites, the defendants were not in a position to give it to him, and thereby caused delay and loss to him. On the other hand the defendants say that the plaintiff was not prepared to take possession, inasmuch as the work on the other site was not complete, and that they were not answerable for the delay in respect of which they claim penalties.

It is not necessary to refer to more than one other dispute. It relates to the tests which, under the specification, the engineer had power to apply to the cement used by the plaintiff. The plaintiff alleges that the engineer improperly rejected a large quantity of cement which he had purchased for the works, and

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which he says bore all the prescribed tests, and this portion of his claim is represented by a sum of £3500.

These being the matters in dispute, the plaintiff, in October, 1897, before the works were taken over from him, sent in a detailed claim for £45,763 9*s.* 4*d.*, entitling it as one for "extras." On examination it appears to include the three substantial matters I have alluded to, namely, (1) the pipe; (2) the delay in giving possession of the sites; and (3) the cement. The defendants' engineer went through the claim and disallowed all the items connected with these three matters. A long correspondence between the parties then followed. The plaintiff proposed that all matters in dispute should be referred for consideration to himself, and a committee of the Commissioners. The defendants declined such a reference, and treating the plaintiff's claim as one for "extras," contended that the 14th clause of the contract furnished the proper tribunal to adjudicate on it. The plaintiff, by a letter of the 11th December, 1897, stated he was advised that the arbitration clause was no bar to his proceeding by action, and that it was utterly worthless, and suggested that all matters in dispute be left to the decision of two arbitrators, or an umpire in case of disagreement. This was declined on the ground that the Commissioners were advised not to depart from the mode of arbitration provided for by the contract, as the matters in dispute were "matters of account," and at the same time the Commissioners made their counterclaim for penalties. The correspondence continued—one side asserting that the matters in dispute went far beyond "disputes and differences arising in the settlement of accounts," and the other contending that these matters came within the arbitration clause, until at last by a letter of the 10th March, 1898, the defendants' solicitor intimated to plaintiff's solicitor that if he still thought the matters were not matters of account, he would consider a draft submission to arbitration if the plaintiff's solicitor would prepare it, and he added that he really did not understand what the plaintiff wished to have put into it beyond what was already covered by the contract. On receipt of that letter the plaintiff's solicitor wrote to the President of the Institute of Civil Engineers to know if he would act as arbitrator pursuant to the arbitration clause, and on

his declining to act, and a controversy having arisen as to accepting a nominee of his, the plaintiff's solicitor on the 6th April, 1898, furnished to the defendants' solicitor a draft form of submission to the arbitration of a single arbitrator whose name was left in blank. This draft submission is an important document in the case, having regard to the contention before us by the Attorney-General, that the plaintiff's present claim for damages in respect of fraudulent concealment has been recklessly introduced to oust the jurisdiction of the Court to stay the proceedings. This draft submission recites that disputes and differences had arisen with respect (*inter alia*) to the liability of the Commissioners "for claims for extras and work done outside the said contract, and for breach of contract and damages for misrepresentation, all of which claims are set forth in certain detailed accounts, and a summary thereof, furnished by the said contractor to the said Commissioners."

From this recital and the subsequent letters it is plain to me that throughout the correspondence the plaintiff was insisting on his right to raise the questions now put forward by his affidavits, notwithstanding that he referred to them as "extras" and proposed that the President of the Institute of Civil Engineers should arbitrate on the claim as the person nominated in the arbitration clause of the contract. It is said on behalf of the defendants that the plaintiff could not be got to formulate the claims which he alleged to be outside of the contract, but by whatever name they may be called—whether "extras," "damages," or "losses"—the particulars of them are contained in the detailed accounts furnished, as I have already stated in October, 1897. From this date—6th April, 1898—the controversy in the correspondence largely turned on the question, who was to be appointed arbitrator. No further reference was made to the draft deed of submission until the month of August, and no exception to its provisions was taken on behalf of the Commissioners, and the construction I place on the subsequent correspondence in August, which the defendants say shows an abandonment by plaintiff of the position he had taken up as to the necessity for a deed of submission, is, that it was but a repetition of the former efforts to get the

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President of the Institute of Civil Engineers to act as arbitrator. The new President, Mr. Preece, on the 18th August, intimated his willingness to act, and on the 24th August the plaintiff's solicitor asks the defendants' solicitor to return "approved" the draft submission furnished on the 6th April, "inserting the name of Mr. Preece." I am satisfied beyond a doubt that the plaintiff never intended to abandon, and never did abandon his demand to have the arbitration extended to the matters which he alleged were outside the arbitration clause; and I have referred to this correspondence only because it was contended on behalf of the defendants that a letter of the plaintiff's solicitor dated the 12th August, in which he approved of the form of a letter asking the President of the Institute to act, amounted to such abandonment and that the plaintiff's attitude in refusing to now go to the arbitration provided by the 14th clause was shifty and disingenuous. I cannot come to the latter conclusion, the more especially as the defendants' solicitor in a letter of the 30th August states that he has gone through the draft submission, and that he cannot adopt it as it was one not contemplated by the contract and wholly beyond it.

Therefore, without offering any opinion whatever as to the merits of the plaintiff's claims, I am convinced that they are made with perfect *bona fides*, and with a deliberate intention of prosecuting them, and that on the documents before us there is no foundation for the contention that they are either sham or frivolous, or that they are put forward with the object of placing an obstacle in the way of a compulsory reference under the 14th section of the Common Law Procedure Act, 1856. Furthermore, they are claims that have arisen in consequence of the contract that was entered into between the parties, and are so nearly connected with it, that it would have been impossible for the defendants to have put forward the contention that they were so alien to the contract, and so severable from matters admittedly coming within the arbitration clause, as to be the proper subject-matter of an independent action. Therefore it is that the defendants move to stay the proceedings as to the whole of the plaintiff's demand—on the ground that they constitute "disputes and dif-

ferences arising in the settlement of the accounts." It has been decided by the Court of Appeal in *Piercy* v. *Young* (1) that the construction of the arbitration clause is, on a motion such as this, for the Court, and that it should not be left to the arbitrator to decide whether the matter in dispute comes within the clause. In my opinion the three principal matters of dispute to which I have referred are outside the arbitration clause. These disputes cannot, it seems to me, be regarded as "matters arising in the settlement of accounts." If the question were one of mere extras—of the engineer's consent to them—of their value according to the scale of prices—or of their maintenance after completion, or if it gave rise merely to the ascertainment of a sum as the result of calculation or measurement, and an adjustment of the account based on items of that character, I would have no doubt as to the application of the clause. But the first claim here is one of, at least, constructive fraud. If we sent that question to the arbitrator disguised as an "extra," the defendants would most properly raise the objection that to constitute an "extra," the engineer's consent to the work was essential, and the plaintiff's claim in this respect would have to be withdrawn. It has been decided that where fraud is charged the Court will in general refuse to send the case to arbitration if the party charged with the fraud desires a public inquiry: *Russell* v. *Russell* (2). No doubt the defendants here who are charged with the fraud do not ask for a public inquiry; but the same case virtually decides that, provided a *prima facie* case of fraud is proved, the action will be allowed to proceed, although it is the party alleging the fraud who desires the public inquiry. On the affidavits before us I think that a sufficient *prima facie* case is made—not of personal fraud—but of constructive and equitable fraud. Even if I am taking too strong a view of this point on the affidavits, there appears to me to be a most difficult question of law to be determined as to the liability of a contractor for the removal of artificial, as opposed to natural, obstacles in the course of excavation and construction. Such a question should not in my judgment be sent to the determination of an arbitrator, and on this ground alone I would decline to stay this action. But

(1) 14 Ch. D. 200. (2) 14 Ch. D. 471.

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the other questions are also of a most serious character, and one of them, at least, namely, that of delay in the execution of the work, with the consequent claims for damages on the one side, and penalties on the other, is, in my judgment, outside this arbitration clause. In *Lawson* v. *The Wallasey Local Board* (1) it was held that a claim for damages for delaying the contractor was not within the arbitration clause; and in *Moyers* v. *Soady* (2), where the clause providing for arbitration was much more comprehensive and elastic than that in the present case, the late Court of Exchequer in this country held that a claim by the contractor for damages for the suspension of the works was clearly outside the submission, and that the action should not be stayed. These cases warrant me in coming to the conclusion that these claims are not within the clause. The other conditions of which we should be satisfied before we refused a compulsory reference—namely, that the claims are made *bona fide*, and are of a substantial character, can scarcely be doubted, and though portion of the large sum claimed may represent matters that might most properly form the subject of arbitration under the clause, the great bulk of the demand falls within the other category, and on the authority of *Turnock* v. *Sartoris* (3) and *Ives* v. *Willans* (4) disentitles the defendants to a compulsory reference. But apart from these cases it is clear from *Walmsley* v. *White* (5), *Joplin* v. *Postlethwaite* (6), and *Vawdrey* v. *Simpson* (7), that this Court has full discretion to determine whether the matters in dispute should be tried out in the action or whether the proceedings should be stayed and the questions referred to arbitration. I am clearly of opinion that, exercising that discretion judicially, this action should not be stayed.

I concur in Mr. Justice Boyd's decision that the application should be refused with costs.

Solicitor for the plaintiff: *W. B. Galway.*
Solicitor for the defendants: *Edward Bates.*

J. M°G.

(1) 52 L. J. (N. S.) Q. B. 302.
(2) 18 L. R. Ir. 499.
(3) 43 Ch. D. 150.
(4) [1894] 2 Ch. 478.
(5) 40 W. R. 675.
(6) 61 L. T. (N. S.) 629.
(7) [1896] 1 Ch. 166.

CORPORATION OF LONDONDERRY *v.* MOORE (1).

Appeal. 1898. Oct. 27, 28. Nov. 1.

Tolls—Market—Sale of milk within limits of city of Londonderry—Londonderry Improvement Act, 1896 (59 & 60 *Vict. c. ccxlix*).

By a local Act (59 & 60 Vict. c. ccxlix) for the establishment and regulation of markets in the borough of L., it was provided that it should be lawful for the Corporation from time to time to demand from any person bringing into the existing or any future market place, or buildings or ground connected therewith, any marketable commodity specified in Schedule B, such tolls as the Corporation should from time to time appoint, such tolls to be supplementary to the tolls in the L. Improvement Act, 1848; "and all tolls payable under the L. Improvement Act, 1848, and under this Act shall be payable to the Corporation on all marketable commodities specified as the subject of toll thereunder, notwithstanding that the whole or the bulk of such marketable commodities sold or offered for sale may not have been brought into the market or buildings or ground connected therewith, or be within the city, at the time of such sale or offer for sale, if such sale or offer for sale was in fact made by sample or otherwise within the city, provided always that the tolls aforesaid shall not be payable if the sale be made in the dwelling-house or shop of the person making such sale." The tolls in Schedule B included sweet milk. The defendant who resided a few miles outside the city of L. was in the habit of sending into the city sweet milk for sale every day (except Sundays) to customers of his who took milk from him regularly. The defendant's servant, who delivered the milk, took with him daily some extra supply in case the regular customers wanted some extra amount, and if they did not, he would sell it to anyone who asked it from him, in case he had it. None of the milk was sold in the market:—

Held (affirming the decision of the Queen's Bench Division), that the defendant was liable to pay toll on milk.

CASE STATED by Kenny, J., at the Londonderry Spring Assizes, 1898, on an appeal from the Recorder of Londonderry. The civil bill had been brought by the Corporation of Londonderry against Robert L. Moore for tolls in respect of sweet milk sold by his servant from a milk cart within the municipal limits of the city of Londonderry, but outside the Corporation Market. The Recorder

(1) Before LORD ASHBOURNE, C., and FITZ GIBBON, WALKER, and HOLMES, L.JJ.

Appeal. 1898. L'DERRY CORPORATION v. MOORE.

dismissed the process, and the Corporation appealed. The following facts were admitted:—A person in the employment of the Corporation bought a small quantity of milk from the defendant's servant on a street within the borough boundary, such servant being then in charge of the defendant's cart containing the bulk of the milk sent in for sale. This servant was in the habit of delivering milk daily at the houses of the defendant's customers within the city on six days in the week. The manager of the defendant's dairy at Molenan (the defendant's residence), some three miles outside the municipal boundary, gave the servant daily the milk required for the customers, and he put on his milk cart as many barrels as he needed, and brought back any milk unsold. He was paid wages, and accounted for the money he received from the buyers. He took daily into the city on a cart as much milk as was required for his regular customers, and from four to six quarts additional for contingencies, as some customers might want a little milk extra. Occasionally a person not a regular customer would ask for a small quantity, and if he had the milk, he would oblige him, and receive payment therefor from him, but none of the milk was ever brought into any of the city markets. The Londonderry Improvement Act (59 & 60 Vict. c. ccxlix) was passed in 1896, and it contained provisions for the regulation of the markets. Section 26 of 59 & 60 Vict. c. ccxlix provided that "From and after the commencement of this Act it shall be lawful for the Corporation from time to time to demand from any person bringing into the existing or any future market-place or places, or buildings or ground connected therewith within the city, any marketable commodity specified in the Schedule B to this Act annexed, such tolls as the Corporation shall from time to time appoint not exceeding the tolls specified in the said schedule, and such tolls shall be supplementary or in addition to the tolls authorized by the Londonderry Improvement Act, 1848 (Schedule D), to be paid to the Corporation, and it is hereby enacted that all the tolls payable under the said Londonderry Improvement Act of 1848 and under this Act shall be payable to the Corporation on all marketable commodities specified as the subject of toll thereunder respectively, notwithstanding that the whole or the bulk of such marketable commodities sold or offered for sale may not have been brought

into the market place or buildings or ground connected therewith, or be within the city at the time of such sale or offer for sale, if such sale or offer for sale was in fact made by sample or otherwise within the city. Provided always that the tolls aforesaid shall not be payable if the sale be made in the dwelling-house or shop of the person making such sale."

The tolls in Schedule B to this Act included sweet milk.

The Corporation by bye-laws duly made pursuant to s. 26 of the aforesaid Act, 1896, appointed the full toll mentioned in Schedule B on sweet milk, and also appointed the markets in which the same might be sold.

Prior to the passing of this Act the power of the Corporation to levy tolls was regulated by the Londonderry Improvement Act, 1848 (which incorporated the Markets and Fairs Clauses Act, 1847, 10 Vict. c. 14) and empowered the Corporation to levy tolls on marketable commodities. Milk was not mentioned in Schedule D to this Act.

Sect. 38 of 11 & 12 Vict. c. cxli, is as follows:—"It shall be lawful for the Council from time to time to demand from any person occupying or using any stand, stall, or shed, pen or place in any such existing or future market-place, or buildings or ground connected therewith, or bringing into such market-place, or buildings, or ground, any marketable commodities specified in Schedule D, such stallages, rents and tolls as the Council shall from time to time appoint not exceeding those specified in the schedule."

By s. 10 the limits of the Act are the borough of Londonderry.

The case stated was argued before the Queen's Bench Division, who gave judgment for the plaintiffs.

The defendant appealed.

Wylie, Q.C., *Henry, Q.C.*, and *R. E. Osborne*, for the appellant:—

The Corporation are not authorized by s. 26 of the Act of 1896 to levy tolls on the goods mentioned in the Act, or the Act of 1848, unless some portion of the goods have been brought into one or other of the city markets. Otherwise toll might be levied upon corn or timber lying on board a ship in any of the ports in the Baltic, consigned to Londonderry, if two persons met, and made

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an agreement for the sale of it, in a street in Londonderry: *Webber* v. *Adams* (1). Here there is no penalty on the sale of commodities made tollable for the first time by the Act of 1896, as the Markets and Fairs Clauses Act of 1847 is not expressly incorporated in the Londonderry Corporation Act of 1896: *Limerick Market Trustees* v. *Quilligan* (2). But the schedule to the Act of 1896 contains articles made subject to toll by the Londonderry Improvement Act of 1848, in respect of which a penalty exists: *Mayor of Derry* v. *M'Elhinney* (3); and there cannot be both a toll and a penalty: *Webber* v. *Adams* (1).

Campbell, Q.C., *Cooke, Q.C.*, and *W. Holmes*, for the Corporation of Londonderry:—

The Corporation are empowered to levy tolls on milk sold on the streets outside the city markets, and the words of the section entitle the Corporation to toll on milk: *Mayor of Derry* v. *M'Elhinney* (3); *Newtownards Commissioners* v. *Woods* (4). Provisions of this sort were inserted in the interest of shopkeepers and stallholders in the market-place, who have paid for their places of business.

Nov. 1.

The judgment of the Court was delivered by—

HOLMES, L. J.:—

The answer to the question asked by the Judge of Assize depends upon the construction to be given to the 26th section of the Londonderry Improvement Act, 1896. In the year 1848 an Act for the improvement of the Borough of Londonderry was passed by which the Town Council was authorised to demand from any person using a stand, stall, or place in the then existing or future market-place of the city, or bringing into such market-place the marketable commodities specified in the Schedule D to the Act, such stallages, rents, and tolls, not exceeding those specified, as the Council should from time to time appoint. The schedule in addition to tolls for sheds, stalls and other standing places, sets forth tolls for a large number of marketable

(1) I. R. 5 C. L. 146.
(2) 14 L. R. Ir. 265.
(3) I. R. 9 C. L. 61.
(4) I. R. 11 C. L. 506.

commodities, such as are usually sold in public market-places, some of which are also occasionally offered for sale from door to door in the streets of a town or city.

The provisions of "The Markets and Fairs Clauses Act, 1847," are incorporated with this Act of 1848, save so far as they are expressly varied or excepted thereby, or are inconsistent therewith; and one of the provisions so incorporated provides that every person other than a licensed hawker, who shall sell or expose for sale in any place within the prescribed limits, that is, the borough of Londonderry, except in his own dwelling-place or shop, any articles in respect of which tolls are authorised to be taken in the market, shall for every such offence be liable to a penalty not exceeding forty shillings.

Up to this point there can be no doubt as to the meaning of the legislation. Tolls can only be demanded for marketable commodities brought into the market-place; and although it might be possible by means of the penalty to oblige the sellers of such commodities to bring them into the market-place, no toll could be recovered for selling or exposing them for sale elsewhere.

In this state of things the Act of 1896 was passed. Schedule B to this statute sets forth tolls for several marketable commodities, some of which are to be found in Schedule D of the previous Act, and others of which appear therein for the first time. The opening portion of section 26 deals with these tolls in Schedule B; and, providing that they shall be supplementary, or in addition, to those authorised by the Londonderry Improvement Act, 1848 (Schedule D), it empowers the Corporation to demand them in language identical with that used for a similar purpose in the earlier statute. Thus the supplemental and additional, as well as the original, tolls are imposed upon articles brought into the market-place. Then comes the portion of the 26th section upon which the decision of the question now before the Court depends.

The following are its words:—"And it is hereby enacted that all the tolls payable under the said Londonderry Improvement Act, 1848, and under this Act, shall be payable to the Corporation on all marketable commodities specified as the subject of toll thereunder respectively, notwithstanding that the

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whole or the bulk of such marketable commodities sold or offered for sale may not have been brought into the market-place or buildings or ground connected therewith, or be within the city at the time of such sale or offer for sale, if such sale or offer for sale was in fact made by sample or otherwise within the city. Provided always that the tolls aforesaid shall not be payable if the sale be made in the dwelling-house or shop of the person making such sale."

It cannot be denied that this is a very clumsily constructed sentence. Its principal defect is the curious collocation of its several branches—a collocation which gives a secondary and apparently subordinate place to the most important portion of it, and which is the cause of considerable circumlocution and verbosity. Notwithstanding this, however, there can be no doubt that the object of the provision is (1) to give tolls in addition to those provided by the Act of 1848, and by the first part of the section, and (2) to make the event on which such tolls would be payable, a sale or offer for sale of any of the commodities enumerated in the two schedules. This much is admitted by Mr. Wylie, who has argued the case on behalf of Mr. Moore; but he also contends that it must be a sale or offer for sale made within the area of the market. He says that the object of the provision was to prevent the market from being used for the sale of commodities on which no toll was paid, and he asks the Court to give it a construction that would not go beyond the object aimed at. The contention thus imputed to the legislature would, no doubt, be both intelligible and reasonable; but there is no reason to suppose that this was the intention. There is no evidence of it to be found in the section itself or any other part of the statute; and I cannot alter the ordinary meaning of language for the purpose of furthering a purely imaginary intention.

Now the portion of the section under consideration, although clumsily constructed, is not obscure. Let me bring its words into a more natural sequence and cut off some of its redundancies. It would then run in something like the following terms:—"It is hereby enacted that all the tolls payable under the Act of 1848, and under this Act, shall be payable on the marketable commodities specified in the schedules thereto, if such commodities are sold or

offered for sale in any place within the city, except the dwelling-house or shop of the seller, although the commodities so sold or offered for sale may not have been brought within the market-place, or be within the city, at the time of such sale or offer." There could, I think, be no doubt as to the meaning of these words; and yet they are practically the same as the clause in question. In introducing into the body of the previous sentence the exception or qualification contained in the final proviso, I have not altered the sense; and the words "the whole or the bulk" and "by sample or otherwise," are plainly surplusage. When the draftsman wrote "notwithstanding that the whole or the bulk of such commodities may not have been brought into the market-place," and afterwards spoke of a sale "by sample or otherwise," it cannot be assumed (as Mr. Wylie seemed to argue) that he was only dealing with cases where either a portion, or a sample, of the commodities had been brought into the market. He is obviously referring also to cases where the whole of the commodities are outside the market; and this is the only reasonable construction of the words he uses. The keynote to the intention is found in the declaration that tolls shall be payable on marketable commodities if they are sold, or offered for sale within the city, out of doors. The main object is that such commodities are not to be placed in a better position than commodities brought into the market-place to be sold there. This object could not have been effected by making the toll payable upon their being brought into the city, for there would be no presumption that they were being brought there for sale. Therefore it was necessary to make a sale, or offer for sale, the condition of the toll attaching. If, however, the enactment had stopped here, it would certainly have been held that it must be a sale or offer for sale of commodities then actually in the city. In *Webber* v. *Adams* (1) all the Judges—those dissenting from the judgment of the Court as strongly as the others—held that corn sold within the city and suburbs could not include corn which at the time of the sale was outside the city and suburbs, and might never be brought therein. This accounts for the explanatory clause introduced by the word "notwithstanding." Without it, tolls might

(1) I. R. 5 C. L. 146.

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have been evaded by selling by sample or otherwise tollable commodities which were kept outside the municipal boundary until after the sale. The clause in question prevents this; but it was never intended to apply where the subject of the sale or proposed sale were goods outside the city, which were not to be brought into it, before or at the time of delivery. The very words of the clause indicate the period at which the presence in the city of the goods is not required as being "at the time of such sale or offer for sale," but there is nothing to show that goods are to pay toll, which may never be in the city at any time.

If I am right in this view, it disposes of an argument strongly pressed by Mr. Wylie—that based on the absurdity of giving the Londonderry Corporation tolls where goods in some distant country are sold, or offered for sale, in a street or newsroom of the city.

I admit the absurdity of such a construction. It could only be exceeded by the yet greater absurdity of causing the tolls in such a case to depend upon whether the contract or offer was made outside or within the market-place, which I understand would be the result of the construction advocated by Mr. Wylie. But I am glad to think that we are not driven into either absurdity.

The only other argument with which I have to deal is that supposed to be furnished by *Webber* v. *Adams* (1). The fact that this case is not referred to in the judgment of Palles, C.B., shows that the Divisional Court considered that it was not in point. In this I fully concur; but as it has been so strongly relied on, I desire to point out how unlike the two cases are. In *Webber* v. *Adams* (1) the Court was asked to construe a local Act relating to the markets of the city of Cork. By its 21st section authority was given to trustees to erect one or more market or markets for corn; and it was provided that it should not be lawful for any person to sell, expose for sale, or buy corn within the city or suburbs in any place other than such markets, upon pain of a pecuniary penalty, provided that nothing therein contained should prevent persons from selling and exposing for sale corn in their own houses, shops, or other premises. The 22nd section authorised the erection of markets for the sale of hay, straw,

(1) I. R. 5 C. L. 146.

green food for cattle, and dead pigs, in language practically identical with that of the preceding section. Section 24 authorised the taking of certain specified tolls from persons selling any corn *within the city or suburbs.* Section 25 authorised the taking of certain specified tolls from persons selling any hay, straw, green food for cattle, and dead pigs, *within the markets.* It is to be noticed that the 24th section contains no provision for the protection of persons selling corn in shops and houses, similar to what is contained in the 21st section, so that if it were construed to extend to the whole city, such sales would be subject to toll, while another consequence of such construction would be to impose tolls on sales which the earlier section declared to be illegal.

In these circumstances the majority of the Judges held that the 21st and 22nd sections indicated so clearly the intention that tolls were only to be taken from persons selling in the markets as to make a corresponding interpretation of the language of the 24th section necessary. They therefore held that it must be construed as being confined to sales within the markets.

This decision is of the highest authority ; but it does not touch the present case. Here the Act of 1848 is absolutely clear. Tolls are thereby only given on articles brought into the market ; and if such articles are sold elsewhere in the city, the only remedy is the penalty provided by the section of the Markets and Fairs Clauses Act, 1847, to which I have already referred, and which it is to be observed, unlike the Cork Act, does not expressly declare the sale illegal. In 1896 another statute is passed, making some additional commodities, including milk, subject to tolls, and admittedly giving tolls on some goods that are not brought into the market. After an interval of fifty years, the Legislature is surely at liberty to alter its mind, and it is not denied that there is a change of policy in the later Act. How then can the provisions of the earlier Act supply a reason for giving a strained and unnatural meaning to a section, which is intended to be a new departure ?

The fallacy in Mr. Wylie's argument is the assumption that it was held in *Webber* v. *Adams* (1) that a penalty and a toll on

(1) I. R. 5 C. L. 146.

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the sale of the same goods are in the abstract antagonistic or inconsistent. No such thing was decided. The mode in which the penalty was imposed on a sale was regarded as evidence that another section of the same statute was not intended to impose a toll for the same sale. But no such inference can be drawn in this case. The Act of 1896 contains no reference to a penalty; and the proviso exempting sales in dwelling-houses and shops from tolls demonstrates that within the city means something more than within the market. The Legislature has declared its meaning clearly and consistently, and the judgment of the Divisional Court is founded on the only construction of which the language used is susceptible.

Solicitor for the plaintiffs: *C. M'Cay.*
Solicitor for the defendant: *F. H. Miller.*

R. D. M.

CUNNINGHAM *v.* THE MARITIME INSURANCE COMPANY (1).

Q. B. Div. 1898. June 6, 8, 20.

(1897. No. 6441.)

Marine insurance—Damage to cargo by perils of sea—Total loss—Notice of abandonment.

The plaintiff effected a policy of insurance with the defendant Company in the sum of £240 on a cargo of potatoes to be carried by sea from Annalong, in the county of Down, to Southampton, such insurance to be free from particular average. The loading, which commenced on January 27th, 1897, was completed on the 11th February, 1897.

There was evidence that the cargo would sprout if kept in the hold for three weeks even though unwet. From adverse weather the vessel carrying the cargo had to put into several intermediate ports. At St. Tudwell's Roads, which she reached on March 11th, she met a gale which caused her to ship water. The vessel arriving at Pwllheli, North Wales, on March 18th, the cargo was examined and found to be sprouting and heated. The ship, from the storm, required some repairs, which could have been executed in a short time, and the defendants requested the captain to proceed with the voyage, which he refused to do. A negotation took place for the sale of the cargo, but this the Court held did not constitute an admission of liability for a total loss. Offers of £100 and £110 were made for the cargo and refused. Ultimately the captain, who claimed to retain the cargo against freight, sold the potatoes at Pwllheli for £55, the purchaser making a large profit on resale. Formal notice of abandonment was given after the sale, but it was admitted that such notice was too late:—

Held (1), that the damage to the potatoes was not exclusively and proximately caused by perils of the sea.

(2) That even if the damage was so caused, there was no evidence of a total loss, actual or constructive.

(3) That even if the potatoes if carried to Southampton would have been a total loss, notice of abandonment under the circumstances was necessary.

Roux v. *Salvador* (3 Bing. N. C. 266) distinguished.

ACTION to recover £240 on a policy of insurance effected by the plaintiff with the defendant Company on a cargo of potatoes

(1) Before GIBSON, BOYD, and KENNY, JJ.

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shipped on board a vessel called "The Snowdon" at Annalong, county Down, for Southampton. The case was tried in Dublin before Mr. Justice Johnson and a common jury.

The statement of claim set out the policy, which was against *inter alia* perils of the sea, and provided that the acts of the insurers or insured in recovering, saving, or preserving the property insured should not be considered a waiver or acceptance of abandonment; and the insurers were warranted free from average, unless general, or the vessel be stranded, sunk, or burnt.

The statement of defence *inter alia* denied that the goods were damaged or lost by reason of the perils insured against, and alleged that no notice of abandonment was given by the plaintiff to the defendants within a reasonable time after the occurrence of injury to the goods or at all.

The evidence at the trial, so far as material to the report, will be found sufficiently stated in the judgments.

At the close of the plaintiff's case counsel for the defendants called for a direction on the grounds *inter alia* that there was no evidence of total loss and no evidence of abandonment. The learned Judge declined to do so at that stage of the case. These requisitions were repeated at the close of the defendants' case, whose counsel objected to each of the three questions which the learned Judge proposed to leave to the jury, but asked that if any questions were submitted to them question No. 4 (*infra*) should be included. Counsel for the plaintiff asked that questions No. 5 and No. 6 (*infra*) should also be left to the jury. Counsel for the defendants objected to these.

The following were the questions which were left to the jury with their answers:—

1. Was there a total loss:—

(*a*) Actual? Yes.

or (*b*) Constructive?

2. Did the vessel strand before she reached her first berth in Pwllheli Harbour? No.

3. Was there a real necessity for the sale by the captain of the potatoes at Pwllheli? Yes.

4. Was the damage to the potatoes caused by sea-water? Yes.

5. Did the plaintiff abandon the cargo to the defendants? Yes.

6. If so, did the defendants by their agent accept such abandonment? Yes.

The learned Judge, being of opinion (as he reported) that there was no evidence of actual or constructive loss and having regard to the answer of the jury to question No. 2, directed a verdict for the defendants, and entered judgment for them.

The plaintiff moved that the judgment be set aside and entered for the plaintiff for the sum of £179 18*s*.

Ronan, Q.C., *Michael J. Dunn*, and *Williamson*, for the plaintiff.

Campbell, Q.C., and *W. Herbert Boyd*, for the defendants.

The authorities cited by counsel are mentioned in the judgments.

Cur. adv. vult.

June 20.

GIBSON, J.:—

In this case it is admitted by plaintiff's counsel that the policy does not apply unless there was a total loss. To change the verdict, the plaintiff must establish that the damage to the cargo was exclusively due to risks insured against by the policy, and that such damage resulted in total loss. The points which present themselves for consideration are:—

(1) Was the damage exclusively and proximately caused by sea perils?

(2) Was there, in fact, an actual total loss?

(3) Was notice of abandonment necessary?

(4) Was an abandonment in fact made and accepted?

(5) Was there a constructive total loss? There is no finding as to this, but it is contended on behalf of the plaintiff that, if there was evidence on this issue, the case must go to a new trial. The defendants urge that there was no evidence to justify the findings, and that, in any view, they were against the weight of evidence.

1. Was the damage exclusively and proximately caused by sea perils? Mere delay in a voyage caused by adverse weather, even

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though such delay occasioned the total loss of a perishable cargo, is not covered by a policy like the present: *Taylor* v. *Dunbar* (1). If any substantial part of the damage was the result of prolongation of the voyage, as the total loss (if proved) would not, in that view, be caused by the perils insured against, the plaintiff could not recover. The loading commenced on January 27th, and was completed on February 11th; but the vessel was not able to sail until the 16th. From adverse weather, she pursued a devious course, putting into Kingstown, then Arklow, next Holyhead, where she stayed a fortnight. She left Holyhead on March 7th, reached Tudwell Roads, where there was a gale, during which she shipped water, and she finally made Pwllheli on the 18th. When the cargo was examined, it was found to be sprouting and heated. The plaintiff's case was that the state of the potatoes was altogether owing to the sea-water. There is no tangible evidence that any sea-water damaged the cargo before the 11th March, when the storm at Tudwell Roads occurred. It appears that potatoes might sprout if kept in the hold for three weeks.

At Pwllheli, Jones, the mate, stated that the potatoes did not suffer from sea-water, but did from overheating. Captain Richards, on behalf of the defendants, asked for the log, and copied it in the captain's presence. The page referring to the 18th March as copied stated that the cargo was then showing signs of heating. The log produced at the trial, in the page relating to the 18th March, contained no such entry as to heating. If Captain Richards' evidence is true, it is difficult to avoid concluding that the log offered in evidence on behalf of the plaintiff was fabricated. What the evidence refers to is a log and not loose slips from which the log was made up. No specific question was put to the jury as to this, but plaintiff's counsel hardly disputed the honesty of Richards' testimony and the genuineness of the copy log taken by him. The cargo, when inspected, undoubtedly showed mischief from heating, serious no doubt, but by no means destroying its value, as sums of £100 and £110 were offered for it before it was finally sold for £55 on April 8th.

On this evidence I do not think that a finding that the dam-

(1) L. R. 4 C. P. 206.

aged condition of the potatoes exclusively resulted from sea-water could be supported; it was certainly against the weight of evidence.

2. Assuming that the damage was entirely attributable to sea-water, was there evidence of any actual total loss? It is settled that this is a question of fact to be ascertained just as if no policy at all had been effected. A total loss is where the subject matter of the adventure insured entirely perishes. Examples of such loss are (*a*) shipwreck; (*b*) capture where there has been no recapture; (*c*) sale by a competent Court resulting from a peril insured against as the proximate cause: *Stringer's Case* (1); (*d*) sale by the captain, where the necessary result of such peril: *Cossman's Case* (2); (*e*) where the delivery of the cargo in specie at the port of destination becomes physically impossible: *Roux* v. *Salvador* (3). In that case there had been a sale by the captain, and the news of the damage to the cargo and of the sale (which was necessary and proper) reached the insured at the same time, so that notice of abandonment would have been an idle form.

Here the injury to the vessel could have been made good at trifling expense in two days, and the voyage could apparently have been completed long before the 8th April when the potatoes were sold at Pwllheli. For reasons of his own, the captain, who was owner of the ketch, declined to proceed. The sums of £100 and £110 were offered for the cargo, which was ultimately sold by the captain on his own responsibility. The sale was quite beyond the scope of his authority, and could not affect the right of any of the parties interested. A master can only sell where there is urgent necessity, and where the owner cannot be communicated with: *Acatos* v. *Burns* (4); *Huths' Case* (5). Notwithstanding that the potatoes had been deteriorating daily after their arrival at Pwllheli, the purchaser seems to have cleared a handsome profit on resale. The transit from Pwllheli to Southampton would have only taken a few days, and the plaintiff has failed to sustain the onus of proving that the potatoes, if promptly conveyed to their

(1) L. R. 5 Q. B. 599.
(2) 3 App. Cas. 160.
(3) 3 Bing. N. C. 266.
(4) 3 Ex. D. 282.
(5) 16 Ch. D. 474.

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destination, would have ceased to exist in specie. The case falls within *De Mattos* v. *Saunders* (1), and was one of partial loss only (see also *Currie's Case* (2)); it is not governed by *Roux* v. *Salvador* (3). If the vessel had been at once repaired and started on its voyage without delay, would not the cargo have been delivered at Southampton in just as good condition as when it was sold at Pwllheli?

3. Assuming that the potatoes, if carried to their destination, would have been a total loss, *Roux* v. *Salvador* (3) is relied upon as showing that no notice of abandonment was necessary. That case is explained by Lord Blackburn and Lord Chelmsford in *Rankin* v. *Potter* (4), on the ground that there had been lawful sale, so that there was nothing to abandon. Had the damage to the cargo in that case been ascertained at a port where the captain could have obtained the owners' directions, he could not have sold without their express authority. The hides at the time of sale were to a large extent in specie, for they realised a considerable sum, and were tanned and turned into leather. A constructive total loss may be made an actual total loss by a lawful sale which the captain is compelled to make in a distant port where the owner cannot be consulted: *Fleming* v. *Smith* (5); *Cossman's Case* (6). If the loss in *Roux* v. *Salvador* (3) was regarded as a constructive total loss only, requiring notice of abandonment, the sale converted such loss into an actual total loss, for which no such notice was necessary. The only obligation of the insured would be to relinquish the proceeds, and on settlement to give credit to the insurers, who were entitled to the amount by subrogation. There is no authority for the proposition that where there has been no sale, where the owner could be consulted, and where the goods are still in specie, the owner could make the insurers liable without express abandonment. There was here something to abandon. Mr. Dunn argued that the captain could have thrown out the potatoes, which must be treated as wholly lost, at Pwllheli. Such an argument is a *reductio ad absurdum* of the conclusion sought to be drawn from *Roux* v. *Salvador* (3).

(1) L. R. 7 C. P. 570.
(2) L. R. 3 P. C. 72.
(3) 3 Bing. N. C. 266.
(4) L. R. 6 H. L. 123, 124, 128, 157.
(5) 1 H. L. Cas. 513.
(6) 13 App. Cas. 160.

4. Was there an abandonment? and was such abandonment accepted?

A notice of abandonment cannot turn a partial into a total loss (*Rankin* v. *Potter* (1)), but it may be that the acceptance of a notice, though invalid, may bind the insurers, and estop them from contesting the fact of total loss. The peculiarity of this case is that the plaintiff did give a formal notice of abandonment; but, as such notice was late, he now has to rely upon the position that the defendants by exercising dominion over the cargo must, by implication, be bound by an admission of liability as for a total loss. I am not aware of any case where liability has been presumed against underwriters from their conduct where there has not been a previous notice of abandonment.

Had there been a notice of abandonment, the plaintiff would have a more plausible argument, though the acts and conduct of the defendants fall far short of those which in *Leduc's Case* (2) were held to establish responsibility. The general principle, however, is that the election of the owners to abandon must be clearly expressed: *King* v. *Walker* (3), and *Parmenter* v. *Todhunter* (4). *A fortiori* must the intention of the insurers to admit total loss be unambiguously declared, especially where, as here, they were under no liability at all, the loss being in fact only partial. In such a case, to constitute acceptance of liability the facts ought to supply an inference of a new contract. The owner never made any intimation to the insurers that he would hold them liable, and they contend forcibly that their conduct was only intended and understood to be for the common benefit of all concerned, without any election on their part to treat the case as one of total loss. A false allegation of stranding was put forward to make the insurers liable for a partial loss. The insurers throughout were trying to get the captain to complete the voyage, but he declined. Had the cargo on arrival at Southampton proved a total loss, the insurers would have been liable, and that risk they were willing to accept, though advised by their agent of its likelihood. Hugh Richards was introduced into the transaction by Cunningham, the plaintiff, and seems to have been acting to some extent as a common agent.

(1) L. R. 6 H. L. at p. 119.
(2) L. R. 6 P. C. 224.
(3) 2 H. & C. 384.
(4) 1 Camp. 541.

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The clause in the policy as to saving and preserving the cargo was relied upon by defendants, but I do not think much reliance can be placed on it. The effect of such a clause *quâ* the insured is explained by Blackburn, J., in *Stringer's Case* (1); but I am not aware of any decision as to its operation with regard to the action of underwriters. Where the cargo is safe, and the only question is as to its sale, the owner being on the spot, and able to act for himself, I doubt if the clause applies. But the notice of abandonment served by the plaintiff, though admittedly not in time, is strong, if not conclusive, proof that up to that time the insurers were not supposed to have accepted liability. On the whole I am not satisfied that there was any sufficient evidence of abandonment and acceptance of abandonment to conclude the defendants. To hold the defendants liable where there was no express abandonment would require the clearest evidence, as no case has been cited to justify such a new departure in insurance law. The plaintiff all through abstained from declaring any total loss, in the hope apparently that the insurers, acting through a common agent, might unconsciously drift into a liability for total loss, which, if explicitly asserted, they would probably have at once repudiated. The alleged stranding was entirely fictitious.

5. If there was no actual total loss, was there a constructive total loss coming within the meaning of that phrase as explained in *Farnworth* v. *Hyde* (2) and other cases? *De Mattos* v. *Saunders* (3) is an authority that there was not such loss. The expense and delay of refitting were trifling, and the plaintiff has not discharged the onus of proving that a sale of the cargo at Southampton would have resulted in more than a partial loss.

Being of opinion that the loss was not entirely attributable to sea-water; that the loss was in part caused by delay from adverse weather and the captain's refusal to proceed; that there was no total loss; that the underwriters were not estopped from proving that the loss was partial only; and that in any case there was something to abandon which made notice of abandonment indispensable, I have come to the conclusion that the verdict and judgment entered for the defendants cannot be disturbed.

(1) L. R. 4 Q. B. at p. 686. (2) L. R. 2 C. P. 204. (3) L. R. 7 C. P. 570.

BOYD, J.:—

The cargo was shipped on board the "Snowdon," and the loading was completed on the 11th February, 1897. On the 10th February, an insurance was effected thereon with the defendants for a sum of £240. By the policy, which was subsequently signed by the Company on the 13th February, it was provided that the said insurers should be free from particular average, unless the said vessel should be stranded, sunk, or burned, but that they should be liable in any event for the total loss of the said cargo by the perils insured against. It has been contended on behalf of the plaintiff that the damage sustained by the cargo during the voyage was caused by the perils insured against, and that such damage caused an actual total loss, and that in consequence thereof he abandoned it to the Company, and they accepted such abandonment. As evidence of such contention he alleges that shortly after the arrival of the said vessel at Pwllheli the agent of the Company endeavoured to sell the cargo, and received offers therefor, which, however, were not accepted.

The Company, on the other hand, contend that there was no abandonment by the plaintiff, but, on the contrary, it was untruly represented to them by the plaintiff that the vessel had stranded, and the cargo was thus damaged. Were such representations true they were liable for particular average. Believing the representations to be true they, with the object of ascertaining the value of the cargo, and ascertaining the amount of particular average payable by them for the benefit of all parties concerned, but not admitting any liability, or accepting an abandonment of which they received no notice or intimation from the plaintiff, made inquiries in reference to the value, but immediately on ascertaining the true facts, and that the vessel had not been stranded, they forthwith discontinued such inquiries and repudiated any liability.

The loading of the cargo, as I have stated, was completed on the 11th February. It was a perishable cargo, and, as stated by the plaintiff in his evidence, "would live without sprouting for three weeks in the hold of a vessel if wet did not get at it," meaning thereby that if wet did get at it, it would perish in a shorter time. The vessel did not arrive at Pwllheli until the

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18th March: that is five weeks after shipment. So, according to the plaintiff, it was natural to expect that sprouting should have been going on for fourteen days before her arrival. The master, on the 19th March, made a protest, and also, on the 22nd, made a deposition before the Receiver of Wrecks, and in neither makes any mention of the stranding of his vessel or of any sea damage to the cargo. On the 23rd March, however, the captain, who had then met the plaintiff at Carnarvon, reported to him that the vessel should discharge cargo to effect repairs, and that the cargo was damaged. Then, and not till then, and after this interview, the allegation is made that the vessel had stranded, and that the cargo was thus damaged. After this interview the defendants were first informed of the alleged stranding and damage. In the log of the vessel, as originally prepared, no mention was made of stranding. The page containing the original entry in the log was torn out and a new and loose page inserted containing an altered statement alleging the stranding. I have no doubt this mutilation of the log and the subsequent altered entry was done after the plaintiff and the captain had met in Carnarvon, and was done for the purpose of making a case against the Insurance Company, and endeavouring to obtain from them payment as for a partial loss. Though the plaintiff was in the vicinity of Pwllheli, he never gave any notice to the defendants of abandonment, and, on the contrary, the captain, who had frequent interviews with him, insisted on retaining the cargo unless his freight was paid or secured to him, and he subsequently sold the cargo on the 8th April. If there had been a total loss at Pwllheli he would not have been entitled to freight, but could have recovered the amount under his policy on freight. During all the interval between the 23rd March and 8th April the defendants were continually insisting on the captain repairing his vessel and proceeding with his cargo and completing his voyage to Southampton. The evidence shows that the repairs could have been effected in two days, and that in two further days the voyage could have been completed. Three whole weeks were wasted in Pwllheli and nothing done either to the vessel or to preserve the cargo. The potatoes were accordingly eight weeks in the vessel, though the plaintiff alleged that without being wetted they would only survive for three weeks. The

cargo was sold by the captain, without communicating with the defendant, for £55, which was much under its value, and the buyer made large profits from its resale. For a large quantity of it he received more than the potatoes were sold for by the plaintiff to the consignees.

When the vessel arrived at Pwllheli, or shortly after, some portion of the potatoes were unquestionably deteriorated, for sprouting existed. What caused that damage? The plaintiff says sea water. I am, however, of opinion, from all the evidence, that a very small portion, if any, of the damage was so caused. At the instance of the captain a survey was held on the vessel and cargo on the 23rd March. In their report of the survey the surveyors make no mention of sea damage to the cargo. On the contrary, they say "the bulk of the potatoes have considerably sprouted, and they show every indication of being in an advanced state of *deterioration*"; and further, "if they are allowed to remain on board much longer, the *deterioration* will be such as to make the potatoes utterly worthless." The evidence of the plaintiff establishes the fact that in a much shorter time "sprouting" and consequent "deterioration" would naturally occur. It was afterwards alleged on behalf of the plaintiff that this damage was caused by sea water, and that he was entitled to claim against the defendants for a total loss. A subsequent survey was made of the potatoes on the 13th April, when a considerable portion of them had been landed, and a large quantity of them had been sold by the purchaser. In this survey the surveyors state that the bottom portion of the cargo had, in their opinion, been damaged by sea water. The bill of lading states that 112 tons were put on board. The plaintiff states in his evidence that he was to receive from his consignee 43*s.* per ton, delivered in Southampton. The purchaser from the captain in his evidence states that he sold 55 tons, at £2 10*s.* a ton, but had to pay for the railway carriage "of some" 4*s.* a ton. He does not say for how many tons he paid. Even assuming he paid this charge for the entire 55 tons, he realised 3*s.* a ton more than if they had been delivered in Southampton. In other words, one-half, at least, of the cargo was in such a sound condition that he was able to realize this large price for it, amounting to £137 10*s.* He also carted eight tons home, of the condition of which he

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did not complain, and he had to throw away two tons only of the entire cargo, and sold all the rest except the eight tons he carted home. In his evidence he states, "the bottom was better than any part of the vessel. A *few inches* of the bottom were rotten and wet. The bottom was very wet." This, I presume, was the portion he states he threw away, amounting to only two tons. It is not stated when he finished his unloading, but it must have been after the second survey, at which time there was a considerable part of the cargo still in the vessel. This was at least nine weeks after the shipment, or three times the natural life of potatoes on board a vessel.

The claim in this case is for a total loss which alone is covered by the policy, unless there was a "stranding," in which case a partial loss could be recovered. This fact being known to both the plaintiff and the captain, was probably the reason the log was tampered with and stranding was invented, so as to enable them to claim for a partial loss in case such may have occurred from the undue length of the voyage.

In *Roux* v. *Salvador* (1) it was held, under the circumstances of the case, that there was a total loss. In that case the cargo, consisting of hides, was entirely injured, so much so that in every hide a process of decomposition had been originated, which necessarily would in a short time, and before the voyage could have been completed, have entirely destroyed them. They remained saleable hides, but not merchantable hides. In these circumstances, the captain sold the cargo at once, without communicating with the owner or insurers. It was held that there was in fact a total loss of the cargo, and no notice of abandonment was necessary to be given to the insurers, as the hides had been properly sold before the owner knew of the loss or could give notice of abandonment. The facts of that case were totally different from the facts of this case. In this case, notwithstanding the delay and neglect, a very large proportion of the cargo was undamaged, and remained merchantable, as proved by the price received therefor. Had the vessel been repaired within a reasonable time after her arrival at Pwllheli,

(1) 3 Bing. N. C. 266.

the cargo might have been delivered at Southampton, long prior to the date at which it was sold by the captain.

It has been contended for the plaintiff that the insurers, by their agent, accepted the cargo, and dispensed with notice of abandonment. I do not think their acts amounted to this, and, as shown by the correspondence to which I hereafter refer, the plaintiff did not so believe. Mr. Richards, Lloyds' Agent at Carnarvon, had an interview with the plaintiff at Carnarvon, and as stated by the plaintiff in his evidence, "I said to him, well what are you going to do? He said, I'll go down and see the vessel ('Snowdon'), and that if she was stranded he would sell the cargo."

On 23rd March, Richards telegraphed to the defendants as follows: "Beached, Pwllheli, now in safety. Captain reports cargo seriously damaged. Can I assist? Wire instructions promptly. Cunningham here." To which defendants replied on same day: "Please protect our interests *by ascertaining and reporting extent of damage*, and what best to do," and again on same day defendants telegraphed, "Act in concert with Cunningham, as best for whoever concerned," and asking for particulars of stranding. Mr. Richards wrote on same date that the vessel was not stranded till beached, and said, "I doubt if this is stranding." Several other letters and telegrams passed between these parties, but no communication of any sort was made by the plaintiff to the defendants. The defendants having ascertained the fact that there had been no stranding, as alleged, insisted on the vessel being repaired and proceeding on her voyage. The captain declined to proceed, and insisted on retaining the cargo unless his freight was paid or guaranteed, which the defendants refused to do. I am of opinion that there was no evidence of any intention on the part of the plaintiff to abandon the cargo, or of acceptance of abandonment by the defendants. What was in the mind of the plaintiff and the defendants was "stranding," causing partial loss; and Mr. Richards acting for both parties, was sent to Pwllheli to ascertain the amount and cause of damage. The captain, who was in correspondence with the plaintiff, and acting for him, never abandoned the cargo, and the plaintiff in no way gave the defendants to understand that he did so, till on the 10th of April,

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two days after the sale by the captain, he served notice of abandonment in the following terms: "Ketch Snowdon's cargo, potatoes insured with you, badly damaged at Pwllheli, and unfit to carry to Southampton. I abandon cargo to you." The terms of this notice are the clearest intimation that till then there had been no abandonment by him. I am also of opinion that it was the duty of the plaintiff if he intended to rely on an oral abandonment, in a clear and unequivocal manner, to give the defendants to understand that he resigned all claim to the cargo: see *Parmenter* v. *Todhunter* (1); *Currie* v. *Bombay Native Insurance Company* (2). In several cases it has been held that to justify an abandonment of a cargo, there must be either a total loss, as in *Roux* v. *Salvador* (3), or a constructive total loss by damage to such a large proportion of the cargo as practically to make it worthless as a cargo: see *Navone* v. *Hadden* (4).

I am of opinion that the damage to the cargo mainly, if not entirely, was caused by sprouting and heating, and not by sea damage. The moisture caused by the sprouting and heating would condense and sink to the bottom, and would easily account for the destruction of the two tons of potatoes. The vessel was not injured except in her upper works—chain-plate broken, covering board started, &c. All the injury was practically on deck, but there is no evidence that any trace of wet was discovered in the upper part of the cargo.

That there was no abandonment of the cargo prior to the 10th, I think is clearly established by the following letters and telegrams:—Letter from W. J. Richards to defendants, March 30th, 1897. Letter, 1st April, 1897, R. J. Long to defendants. Letter, 2nd April, 1897, defendants to Long. Telegram from Captain to plaintiff, 2nd April, 1897. Letter, plaintiff to consignees, 2nd April, 1897. Letter, E. Roberts & Co., to plaintiff, 6th April, 1897. Letter, defendants to plaintiff, 10th April, 1897.

On the whole case of the plaintiff, I am of opinion there was no such damage as would have justified an abandonment, and that there was no abandonment in fact, and no expressed intention of abandonment, until the notice of abandonment was served on

(1) 1 Camp. 541. (2) L. R. 3 P. C. 72, 79. (3) 3 Bing. (N.C.) 266. (4) 9 C.B. 30.

the 10th of April, and that the learned Judge should, at the close of the plaintiff's case, as required, have directed a verdict for the defendants, and that he was right in so directing at the termination of the case, notwithstanding the findings of the jury.

KENNY, J.:—

I concur so entirely with the conclusions at which my brother Gibson has arrived and with the reasoning on which his exhaustive judgment is based, that it is needless for me to add more than a few words.

The plaintiff's case was substantially presented from two points of view. It was contended in the first place, that there was an actual total loss of the cargo,—in the sense in which that expression is interpreted in *Roux* v. *Salvador* (1),—as a result of one of the perils insured against; and, secondly, that even if the loss were neither "total" nor "actual," the defendants through their alleged agent, Hugh Richards, took possession of the cargo on the basis of an actual total loss, and cannot now be allowed to make the contrary case. On every question submitted to them (except as to stranding), the jury have found for the plaintiff, and on the main issue of actual total loss they must have done so in the face of the learned Judge's charge that there was no evidence to support a finding in the plaintiff's favour. If Mr. Justice Johnson had entered judgment for the plaintiff, instead of acting on his own strong opinion, we would now have had to consider whether such a verdict could be allowed to stand, and if not, whether we should send the case to a new trial, or enter judgment for the defendants.

To constitute an actual total loss at an intermediate port, the cargo must have wholly perished or become wholly irrecoverable, or the process of destruction must have advanced so far that the prospect of delivering the cargo in specie at the port of destination must have become hopeless. In either case the loss must be caused by one of the perils insured against. If it cannot be reasonably affirmed that the cargo—if the voyage be continued—will cease to exist in specie at the port of destination, there is no actual total loss. Again, if part of the cargo will in the probabilities of the case be capable of being delivered in specie, or if a total loss be

(1) 3 Bing. N. C. 266.

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partially attributable to a cause not covered by the insurance, there is only a *partial*, as distinguished from a *total*, loss, and a total loss policy, such as the present one, would not cover it. If the cargo is not wholly destroyed but its delivery in specie is highly improbable, though not absolutely hopeless—the loss is a constructive total loss, and may be deemed to be an actual total loss, provided there be an abandonment of the cargo and notice given of such abandonment. I dismiss the question of constructive total loss. The jury have given no finding on it. The plaintiff's counsel in argument put the case as one of *actual* total loss, and in my opinion there is no such evidence of notice of abandonment up to the 10th April, when such notice was admittedly late, as could properly be presented to a jury. The acts of Hugh Richards and the correspondence with the defendants on the 23rd, 24th, and 25th March, have been strongly relied on—not so much, however, as establishing notice of abandonment, as of evidencing the taking of possession by defendants and the creation of an estoppel. I shall say a word later on as to this part of the case.

It seems to me that on the facts no jury could reasonably find that a substantial part of the cargo would not have reached Southampton in specie. Of course, if they assumed an abnormal prolongation of the voyage, the probability of complete loss might not be unreasonable. The vessel arrived at Pwllheli after more than a month's voyage, from the county of Down, on the 18th March. Part of the cargo had then been on board seven weeks. The whole of it had been on board for five weeks. Under these circumstances the jury may have thought that allowing for delay in the same proportion for the remainder of the voyage, it was hopeless to expect the cargo to remain in specie until it arrived at Southampton. But the master distinctly states that the vessel could have reached Southampton on the 22nd or 23rd of March, allowing two days for repairs and two days for the voyage, and all the evidence points to a substantial portion of the potatoes being in good condition long after the 23rd March. Offers of £110 and £100 were refused for them, and it was not until the 8th April they were sold, and they then realized £55. Furthermore, the purchaser admits having made a considerable profit on the trans-

action. In the face of this evidence I am of opinion that there was no actual total loss, and that there was no evidence on which a jury could reasonably find that there was a loss other than a partial one.

But if I assume that at Pwllheli the cargo was in such a condition on the 18th of March, that it was hopeless to expect a delivery in specie at Southampton, the very important question arises whether that condition was wholly caused by perils covered by the policy. I am convinced on the evidence that it was not. The plaintiff's case is that the damage was caused exclusively by sea water. The proof is slender in the extreme. While, on the other hand, there is to my mind overwhelming evidence that the injury was largely, if not altogether caused by overheating, without reference to any external cause. The plaintiff and Thomas J. Williams, one of his witnesses, deposed that potatoes might remain in the hold for three weeks without sprouting or heating. Other witnesses for plaintiff stated that the cargo was fairly good at the top, and became bad as you went down. The portion at the bottom had been, as I have already observed, seven weeks in the hold on the 18th March, and the condition thus described was such as might be expected. There was therefore every reason to conclude that, apart from all contact with sea water, the length of time during which the potatoes were thus in bulk would have produced the appearance which they presented at Pwllheli. A startling piece of evidence confronts the plaintiff on this part of the case. The log has unquestionably been fabricated in a vital particular. The original page of the 18th March contains an entry that the cargo was then showing signs of "*heating*." In the log, as produced, another page has been substituted, with that statement omitted. I cannot but regard this as disastrous to the plaintiff's case. The statement was omitted evidently, because the master or mate, on the 18th March, regarded "overheating" as the cause of the injury, and subsequently realized the effect of such an entry when it was sought to attribute the damage to the action of the sea water.

No verdict for the plaintiff of total loss from sea peril could, in my opinion, stand after the disclosure of this attempted fraud, and

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on this branch of the case also I come to the conclusion that the loss was "partial" and uncovered by the policy.

It remains to consider whether the defendants should be held to have taken possession of the cargo at Pwllheli, through their alleged agent, Hugh Richards. On the evidence, I am of opinion that it has not been established, either that Hugh Richards had authority to assume such possession or to accept abandonment. I am also satisfied he never did take possession of, or assume dominion over, the cargo. But what, in my judgment, is conclusive on the point is, that the sale of the 8th April is stated by the master to have been made by him on his own responsibility, and it was then that formal notice of abandonment was served. In *any* case a notice of abandonment ought to be clear, and ought to leave no doubt as to the intention of the insured. And in the circumstances of the present case it was imperative that such a notice, in order to be effective, should have been of that character—yet apparently it never occurred to the plaintiff to give such a notice until a period, namely the 10th April, when it was admittedly late. It leaves no doubt in my mind that the plaintiff, who was on the spot and knew what was taking place, never, up to that time, believed that there had been an assumption of dominion by the defendants over the cargo. My conclusion on this point is strongly confirmed by the plaintiff's letter of the 2nd April, referred to by my brother Boyd. I cannot see that anything would be gained by sending this action to a new trial. In my opinion, we have all the necessary materials before us for determining the questions at issue, and I think that the judgment entered for the defendants should not be disturbed.

Solicitor for the plaintiff: *Simon F. Hanratty.*
Solicitors for the defendants: *Stanuell & Son.*

J. P. B.

ANTISELL *v.* DOYLE (1).

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Building contract—Liability of building owner to surveyor's fees for taking out quantities—Custom of building trade—Unreasonableness.

The defendant, desiring to build certain houses, employed an architect to make out plans. The architect, having done so, instructed the plaintiff, a quantity surveyor, to take out quantities, and when these were completed the architect invited tenders, all of which exceeded the limits of the defendant's proposed expenditure. No tender was accepted. It did not appear that the defendant had authorised the application for tenders.

The plaintiff sued for the amount of his charges for taking out the quantities, and relied on the alleged custom in the building trade, throwing on the building owner the liability for the surveyor's fees where no tender is accepted, or for other reasons, the work is not proceeded with.

The jury found at the trial that the employment of the surveyor was neither within the scope of the architect's authority, nor sanctioned by the defendant; and that there is no custom authorising such employment without the consent of the building owner:—

Held (*diss.* Sir P. O'Brien, L.C.J.), that the defendant was entitled to judgment.

Per O'Brien and Gibson, JJ., that the custom relied on was not one of which the Court must take notice; that, even if the alleged custom was reasonable (as to which, *quaere*), the verdict against the custom could not be interfered with.

Per Sir P. O'Brien, L.C.J., that if the defendant impliedly or expressly authorised the architect to invite tenders, she thereby impliedly authorised the employment of the surveyor, and that accordingly a question should have been left to the jury, whether she did so authorise the architect, and that therefore there should be a new trial.

Dictum of Monahan, C.J., in *Taylor* v. *Hall* (I. R. 4 C. L. 467), disapproved. *Moon* v. *Whitney Union* (3 Bing. N. C. 814), considered.

ACTION for fees claimed by the plaintiff, a quantity surveyor, in respect of work done by him in taking out the quantities of certain houses, which the defendant had intended to build, but which in fact had never been commenced. The action was tried before Madden, J., by a common jury of the city of Dublin in Michaelmas Sittings, 1897.

(1) Before SIR PETER O'BRIEN, L.C.J., and O'BRIEN and GIBSON, JJ.

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The defendant was the owner of leasehold premises in Merrion. In the beginning of 1897, she instructed Mr. W. H. Beardwood, C. E., to act as architect for her, and to prepare plans for eight houses, the total cost of which was not to exceed £6500. Mr. Beardwood prepared plans accordingly, and instructed the plaintiff to make out the quantities in respect thereof. Mr. Beardwood thereupon invited tenders for the contract, and eleven tenders were put in, of which the lowest amounted to £7500. The defendant then requested the architect to amend the former plans by adapting them for ten houses of a less expensive character. This was accordingly done, and the architect again instructed the plaintiff to take out fresh quantities. Tenders were invited from two contractors only, and as the lowest tender amounted to £9300, the defendant decided to abandon the projected building, and she communicated this determination to the architect. No tender was accepted.

The architect's fees were settled and paid on the 25th August, 1897. Subsequently to this settlement, the plaintiff submitted his account, certified by the architect, and amounting to £100, for payment by the defendant. The defendant denied any liability in respect of these charges, and the plaintiff thereupon instituted this action for their recovery.

Evidence was given at the trial on the plaintiff's behalf of the existence of a custom that the architect, on behalf of the building owner, employs a quantity surveyor to prepare the quantities; that when the work is proceeded with, the contractor pays the quantity surveyor; but if it is not proceeded with, the building owner pays the surveyor's fees which are calculated on the per-centage of 1½ per cent. on the accepted, or the lowest tender, as the case may be. It also appeared, that in 1896, a rule was passed by the Builders' Association, under which, when the amount of the proposed work is over £500, or there are more than two tenders offered, quantities must be taken out by a surveyor.

The evidence on the defendant's behalf was to the effect that, while it is usual for the architect to proceed to have the quantities taken out, there is no custom, authorising him to employ a surveyor without the previous consent of the owner, or making the owner liable to the surveyor in the event of the work not being carried out.

There was a conflict of evidence as to whether the architect had made any previous communication to the defendant of the necessity of having the quantities taken out. Mr. Beardwood in his evidence stating that he informed the defendant that no builder would tender without quantities.

The following questions were left by the learned Judge to the jury:—

Was the employment of a quantity surveyor within the scope of Mr. Beardwood's authority?

Had he authority to so employ him for a contract exceeding £6000?

Was the employment of a quantity surveyor sanctioned by the defendant?

Is there a custom in the trade to have a quantity surveyor employed by the architect, irrespective of the consent of the employer?

All the above questions were answered by the jury in the negative.

The learned Judge at the trial declined to allow judgment to be entered for the defendant, as he considered the findings of the jury were against the weight of evidence.

The defendant thereupon moved for judgment on the findings of the jury. There was a cross-motion on the part of the plaintiff for judgment, on the grounds of non-direction and misdirection, and alternatively for a new trial.

Serjeant Dodd, and *J. H. Pigot*, for the defendant.

Bushe, Q.C., and *Leech*, for the plaintiff.

The arguments of counsel, and the cases referred to, sufficiently appear in the judgments.

Cur adv. vult.

May 6.

O'BRIEN, J. (1):—

The question is whether the employment of an architect implies an authority to engage a building surveyor, and whether there

(1) Mr. Justice O'Brien being engaged at Nisi Prius, his judgment was delivered first.

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is a positive rule of law establishing a custom that the building owner is liable for his fees when the work does not go on. The case is one affecting a trade or profession, though on occasions necessarily not frequent, and therefore still of more importance than one merely of individual liability, when we are called upon to lay down a rule, or to say that there is no rule as distinct from the facts of the particular case.

So far as any question of fact is involved, the case is disposed of by the findings of the jury, unless the weight of evidence were the other way in the degree that the Court now takes cognizance of, which was a ground scarcely touched upon in the argument. With respect to the first question, whether the employment of the surveyor was within the scope of the architect's authority—that would not necessarily be determined by any rule of law resulting from the particular relation, but takes in all the circumstances and terms of the architect's own employment, which might vary any such rule, or admit of its application, and therefore is a matter of fact necessarily to be submitted to the jury, though, if the authority attached upon the particular relation alone, and there were no facts whatever affecting it, that would be a question of law.

In the case referred to—*Waghorn* v. *Wimbledon Local Board* (1), there was for example an admitted circumstance which is not expressly found in this instance, namely, a direction to obtain tenders, which, together with the mode and circumstances of that proceeding, could not but be allowed to enter into the consideration of the jury upon the question of actual authority. For the ground on which that case really went was not custom at all, or implied authority from the relation of the architect, but of actual authority as comprehended in the extent of that which was given. The alleged custom of trade is negatived absolutely; so that we are in the peculiar position of being required to hold that a custom of trade has passed out of the region of evidence into a conclusion of law, which can no longer be questioned, and is the subject of direction, in the presence of the finding of a jury that no such custom in fact exists.

(1) Hudson on Building Contracts, vol. 2, p. 87.

Of course it must be conceded that custom by frequent proof and recognition is capable of hardening, so to speak, into a rule of law; and this is what we are asked to consider has happened in the present case. But certainly the matter is one of great difficulty when the question whether the process of conversion has taken place is not determined by instant perception and assent, on the proposition being presented to the mind; but requires a further judgment of a Court to decide whether previous judgments have produced that effect. The conditions of this crystallizing process by which custom becomes law are stated in the case of *In re Matthews* (1)—a case under the order and disposition clause in bankruptcy—and *In re Hill* (2)—a case of cabs let out on terms of hire and purchase, where the custom alleged was not allowed to prevail against creditors. Lord Justice Mellish laid down the rule in these terms (3), "We think the result of the cases is that in order to establish a custom it must be proved to have existence so long and to have been so extensively acted on that the ordinary creditors of the debtor in this trade may be reasonably presumed to have known of it." It may be suggested that the relation of debtor and creditor is so general, and the exceptions to the inference of ownership from possession so few, that persons would not be specially concerned to take notice whether the exceptions arising from the custom existed, and that persons who enter into a relation of contract for building may be supposed to take notice of what is incident to the business. But any custom is admitted in evidence on the principle that it is a silent term of the contract which the parties have in their minds; and therefore the notoriety and frequency of it necessarily enter into the measure of the proof. In that case the manifest reason and justice of the thing led the Court to the conclusion of offering to the plaintiff an issue on the custom, which is the matter that has been determined here, and, he having declined to take it, it decided against him.

Now, can the decisions that exist on this question of the quantity surveyor be stretched at all to meet the extent of a definition of a custom which will be recognised as a rule of law, not requiring or admitting of evidence? In this country there are two cases:

(1) 1 Ch. D. 501. (2) 1 Ch. D, 503, note. (3) 1 Ch. D. at p. 507.

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Taylor v. *Hall* (1), and *Gribbon* v. *Moore* (2). The first of these was an action against the builder, in which Morris, J., refers to *Moon* v. *Witney Board of Guardians* (3) as having decided that where the architect prevents the building going on, he is liable for the surveyor's fees; and Monahan, C.J., using very different language, says—"If for any reason the owner changes his mind, and no contract is entered into with the builder, the owner is of course liable to the surveyor, he being the person for whom the work has been done, and the architect having the express or implied authority of the owner to employ the surveyor." The builder in that case, upon the result of the appeal, was held to be liable; and Mr. Leech contended that, because it was established that the builder was liable, either upon his contract or upon the custom, the other branch of the alleged custom, that the owner was liable where the contract went off, was made out in point of law, though that was not necessary to give the plaintiff a verdict; and there was no one concerned to dispute the proposition. And he further contended that Lord Morris's short reference to *Moon* v. *Witney Board of Guardians* (3), with regard to custom, while he gave his decision on the ground of contract, had established the custom as a rule of law, which it certainly did not. Although a custom of trade, made out in England, where such diverse conditions exist, and converted by uniform decision into a rule of law, would not necessarily apply to Ireland, it is quite certain that the cases which were cited in the argument for the plaintiff, do not adequately represent at all the state of authority on the subject. *Gribbon* v. *Moore* (2), before Monahan, C.J., was tried in the year 1869. In that case, the report of which is taken from *The Builder*, as we sometimes find reports of cases favourable to a particular trade taken from their special organs and publications, the defendant made the case that under no circumstances was he to pay the plaintiff, and that he instructed the architect to that effect. This the architect denied, and asserted that the surveyor was employed under the usual arrangement as set forth in the documents; and what the documents set forth was, that the surveyor was to be paid by the builder whose tender was accepted, out of the first instalment of the contract—

(1) I. R. 4 C. L. 467; I. R. 5 C. L. 477. (2) 2 Hudson, 14.
(3) 3 Bing. N. C. 814.

giving no notice at all to the employer of the alternative that happened. And the case was tried upon the contradictory evidence of express contract and on the evidence of usage in fact. Of course, if the special contract to the contrary were negatived, the plaintiff would still require the rule as to the implied authority of the architect to entitle him to recover. But he plainly did not rely on that; for the Judge said that "on the authority of the case cited, as well as the usage proved," the employer became liable.

In *Gwyther* v. *Gaze* (1) the case was likewise made of positive restriction of the architect's authority, and it was upon that it was left to the jury. That case, too, therefore was purely negative.

As to *Waghorn* v. *The Wimbledon Board* (2) that was a case of actual authority, implied from the relation of a surveyor to a public board, and from the direction to him to obtain tenders. All these, moreover, were Nisi Prius rulings.

But it was inevitable that such a pretension as that of one agent to appoint another agent, contrary to the principle of the common law, without the knowledge of the principal—and that of an agent withal, having by the terms of his remuneration a direct interest adverse to the principal,—could not pass without being generally challenged. And accordingly we find it challenged all round, in cases and statements, cited in the very text-book, "Hudson on Building Contracts," from which the supposed decisions the other way have been drawn. Commenting upon the evidence in *Birdseye* v. *Dover Harbour Commissioners* (3), that in any large matter, say one of £2000, the architect was entitled to call in a quantity surveyor to be paid by the employer—the text-book says:—"If quantities are to be supplied to builders for tenders, and the architect, with the *express* authority of the building owner, either employs a quantity surveyor or takes them out himself, and is paid by the building owner direct, the ordinary relation between a client and any professional person performing work for reward exists." And then he goes on to put the case which, he says, often arises: "The employer is in entire ignorance even of the name of the quantity surveyor, and so is the builder, until he receives a bill of quantities."

(1) 2 Hudson, 16. (2) *Ib.* 87. (3) *Ib.* 4.

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If an employer were told that to get tenders on a work, say, costing £3000, he must incur an expense of £100 for quantities, and lithographers' charges in addition, he might either not build at all, or he would have some voice in the amount of the quantity surveyor's remuneration. He might make his own bargain with him, for instance, as with the builder; whereas in many cases the building owner is kept completely in the dark, and it is not till the tenders come out too high, and he refuses to go on with the work, that he is told there is a "little bill to pay the quantity surveyor" for work he never heard of. And then Hudson goes on to say that the authority of the architect to employ a quantity surveyor to supply quantities may be implied from the knowledge of the building owner that they will be supplied, and by the employer standing by and saying or doing nothing, or by ratification—which was *Moon* v. *Witney Union* (1), or by express authority to obtain tenders—which was the case of *Waghorn* v. *Wimbledon Local Board* (2)—or by custom, for which he refers to *Taylor* v. *Hall* (3).

In the present case, the question is not whether the plaintiff is entitled by custom, which was negatived, but whether the custom has become a rule of law. The very argument that was used as to the amount of the contract in *Birdseye* v. *Dover Commissioners* (4), and the regulation of the Institute of Architects, referred to before us, requiring quantities where the cost of the work was over £500, are fatal to the case, as it is absurd that either uniform custom or rule of law could be affected by or varied according to the cost of the work. In a case in the year 1884 in which the question as to the custom of an architect to call in a quantity surveyor was raised, *Plimsoll* v. *Lord Kilmorey* (5), Lord Denman said:—"With reference to the general usage of which evidence had been offered, I think a jury would hesitate to establish it; there were good grounds for considering it unreasonable, as applied to circumstances such as were presented in this case, and it would often prejudice a building owner."

(1) 3 Bing. N. C. 814.
(2) 2 Hudson, 87.
(3) I. R. 4 C. L. 467.
(4) 2 Hudson, 4.
(5) 1 *Times'* Rep. 48.

But now let us see what *Evans* v. *Carte* (1) decided in the year 1881. The marginal note is as follows:—"An architect was employed to make plans for a theatre. The employer objected to the cost of the theatre as planned, and the architect employed a quantity surveyor to reduce the quantities, but the employer ultimately decided not to build; *held*, that the quantity surveyor could recover his charges against the employer only upon evidence of actual instructions and not by virtue of any custom." In the course of the argument Lord Coleridge said that "apart from actual contract it was quite monstrous that the employer should pay for the 'quantities'—that is, that he should pay for what it is the duty of the architect to do. The builders are to make their tenders upon the plans, but before they do so, they must know the 'quantities' they represent. Why should the architect's employer pay for them? In the actions I have tried, it has been urged that if the building goes on the employer actually pays for the quantities, as the builder adds them to his prices, but it has never been suggested that the employer is directly liable to pay for them, except upon the ground of some custom or contract." The verdict for the defendant in that case was not disturbed, because it went upon the ground of alleged authority, as to which there was conflicting evidence.

That case seems to me to put an end to the plaintiff's contention. I agree in characterizing the proposition as simply monstrous, that a person should be called upon to pay for the services of another, of whom he never heard, and the nature of whose business is attended with an interest in inflating the amount of the contract. The case, in my opinion, is merely an example of the incessant effort of particular trades, for their own interest, to force into the category of custom regulations of their own, to which it is quite hopeless to suppose persons of prudence would give their assent. The plaintiff has unfortunately lost his time and labour, but has lost it upon the speculation of the ordinary result happening, that the work would go on, without reckoning upon the unforeseen event, of a woman changing her mind—*varium et mutabile semper*—as of old.

(1) 2 Hudson, 10.

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GIBSON, J. :—

The cause of action in the writ is founded on contract. The contract is sought to be established by reference to a usage said to exist in the building trade. The importance of the case arises from this, that the plaintiff contends that the alleged custom has now been so often recognised in verdicts and judgments that the Court is bound to take judicial notice of its existence and validity. The evidence produced at the trial was not strong either in quality or quantity, and the jury found all the questions left to them against the plaintiff. If this case brought the alleged custom before the Court for the first time, it would be difficult to upset the verdict. The plaintiff therefore relies mainly on an alleged course of judicial decision, which makes it the duty of the Court (it is urged) now to declare that the usage binds all Ireland.

I propose, first, to consider the nature and peculiarities of the alleged usage; secondly, the cases on this subject, in England and in Ireland; thirdly, the evidence of usage in this case, and fourthly, whether, apart from usage, the plaintiff is entitled to succeed on contract based on implied authority of the architect to employ the surveyor on the defendant's credit.

I. The usage consists of four parts :—1, the architect, when not forbidden by the owner, may employ a building surveyor to take out quantities; 2, the surveyor is entitled to be paid for his services by the builder whose tender is accepted; 3, the rate of remuneration is $1\frac{1}{2}$ per cent. on the accepted tender; 4, if no tender is accepted, the surveyor is to be paid by the owner $1\frac{1}{2}$ per cent. on the lowest tender; and, if there is no tender, $1\frac{1}{2}$ per cent., calculated apparently on the bill of quantities. The custom does not provide that, as between owner and builder, the latter, if he becomes liable, is to be repaid by the former. This is left to free contract. The custom secures the surveyor, but not the builder. It shifts the obligation from the owner, with whom there is or may be a contract, to a person with whom there is no privity of contract. The usage seems anomalous. If the architect has implied authority from his principal to engage the surveyor, why is not the latter to be paid by the owner his employer? Why

is he to look to the builder, who does not engage his services, and who is left to obtain repayment from the owner by express contract, if the owner can be got consciously or unconsciously to enter into such a contract? The builder, who is responsible to the surveyor for the latter's fees, curiously cannot sue the surveyor for negligence in the work paid for: *Priestley* v. *Stone* (1). If the builder fails to pay the surveyor, the latter has no claim against the owner. Again, the rate of remuneration is not constant. The fees calculated on the lowest tender, and on the bill of quantities where there is no tender, may not be identical. It might conceivably happen that the surveyor might frame the quantities in such a way that tenders might be unlikely, and the owner would become liable for fees on the quantities without the control of any accepted or lowest tender. What is to happen if the lowest tender is accepted subject to a modification, omitting a large part of the work? Is the builder in such case to pay fees on the work not included in his contract? In some reported cases I observe that the customary fee was represented as $2\frac{1}{2}$ per cent. A usage which oscillates from $2\frac{1}{2}$ per cent. to $1\frac{1}{2}$ per cent., is peculiar. Trade usages of recent origin are eminently fit for jury consideration, and Courts should be on their guard lest they should, at the expense of the public, stereotype, as legal customs, what are really attempted encroachments on liberty of contract. Such attempts have often been made without success. Thus, architects have sought to establish a usage entitling them to retain plans: *Ebdy* v. *M'Gowan* (2). *Mollett* v. *Robinson* (3) supplies an illustration in another business. Why is the owner to be bound by custom and not frankly by express contract? Is the explanation that many owners would decline to enter into such contract? If an owner is ultimately to pay, he might insist on selecting the surveyor, or on fixing the conditions and amount of his remuneration. No doubt, if there is a notorious usage of a reasonable character in a trade, every trade-contract is tacitly presumed to be made with reference to such usage. But is the present alleged usage such a one? Does it apply to all building contracts, irrespective of value, all over Ireland? No analogy at

(1) 2 Hudson, 53. (2) 2 Hudson, 7. (3) L. R. 7 H. L. 802.

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all resembling it has been cited. Cases where brokers are by custom liable as well as their principals are quite different. Such liability is derivative and substitutional. Here the owner is not an unknown principal; the builder is supposed to be himself a principal, who is, without privity of contract with the surveyor, primarily liable by custom, though he can have no right against the owner to repayment save by express contract. The owner's responsibility to the surveyor is secondary, and does not arise at all if there is an accepted tender, even though the builder fails to pay: *Young's Case* (1). It was the opinion of Lindley, L.J., in *Priestley* v. *Stone* (2), that the alleged custom was unreasonable: see also *Kempston* v. *Butler* (3). If there is no privity of contract between the builder and the surveyor, how can a modern usage give a direct cause of action? A contract may embody by implied reference a modern trade usage; but to create a substantive obligation apart from contract, immemorial custom may be necessary, as Christian, J., thought in *Kempston* v. *Butler* (3).

II. I now take up the authorities, some of which, not cited at the bar, seem adverse to the plaintiff. As they are not all quite consistent, it is best to deal with them in chronological order. There are eight in England, and three in this country. Of the eight English cases, the first six were actions against the owner, and two were between the builder and surveyor. In only one case (the last) was it held that the builder could be sued, and the decision is not easily reconciled with the opinion of the Court of Appeal in *Priestley* v. *Stone* (2).

The earliest case cited was in the year 1837: *Moon* v. *Witney Guardians* (4), where the evidence is given. The usage, according to most of the witnesses, was that, of recent years, architects had quantities made out by surveyors, and the fees were added by the successful contractor to his tender. There was no usage proved that the owner, if there was no accepted tender, was directly liable. There was evidence that the guardians had sanctioned the employment of the surveyor, and had recognised it as within the scope of the architect's authority. The Court held that the guardians, by preventing the plaintiff from receiving his fees

(1) 2 Hudson, 100.
(2) *Ib.* 53.
(3) 12 Ir. C. L. R. 516.
(4) 5 Scott, 1; 3 Bing. N. C. 814.

from the builder, were bound by a kind of conditional contract. The reasoning of the Court is not convincing. The usage was of recent origin, and the responsibility of the defendants was based on contract.

The next case was *Scrivener* v. *Pask* (1), in the year 1866, thirty years later. There the plaintiffs, as builders, had agreed with the defendant to build a house for him to the satisfaction of Paice his architect. Paice had the quantities taken out by a surveyor, his partner, and represented to the builders that they were correct. The latter paid and added the amount to their tender. Lansdowne, one of the plaintiffs' witnesses, proved (2) that the builder sometimes took out the quantities for himself, and that a careful builder would not rely on the architect's quantities. Sometimes the surveyor acted for the owner, and sometimes for the builder; but whoever employed him, whether the owner or the builder, the money for his fees went through the builder's hands, and was included in the contract. The action was brought by the builders against the owner, on a warranty as to the accuracy of the bill of quantities. The Court of Exchequer Chamber held that Paice was not the defendant's agent for the purpose of taking out the quantities. Blackburn, J., threw out that the plaintiffs might have a remedy if Paice had been guilty of misconduct. Pollock, C.B., pointed out that the quantities might have been too large to the detriment of the owner. *Gwyther* v. *Gaze* (3) was a *nisi prius* case, before Mr. Justice Quain in the year 1875. The action was against the owner, no tender having been accepted. The customary fee was represented to be 2½ per cent. on the lowest tender. The Judge held this to be unreasonable where the tender was not accepted. The defence was founded on special contract excluding any custom. The jury found for the plaintiff. The fourth case was *Waghorn* v. *Wimbledon Local Board* (4), tried before Manisty, J., and a jury, in the year 1877. The defendants, by resolution, authorised their salaried surveyor to procure plans and tenders, and in pursuance thereof he

(1) 18 C. B. (N. S.) 785; L. R. 1 C. P. 715.
(2) 18 C. B. (N. S.) at p. 791; L. R. 1 C. P. at p. 717.
(3) 2 Hudson, 16.
(4) *Ib.* 87.

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directed Waghorn to take out quantities. No tenders were accepted. Defendant's counsel objected that there was no evidence to go to the jury. The Judge ruled that there was implied authority—that is, I presume, evidence of such authority. There clearly was some evidence which could not have been withdrawn from the jury, and counsel's requisition was wrong. The next case is *Young's Case*, in 1879 (1), a case of much importance. There the builder's tender had been accepted ; the builder became bankrupt without having received the surveyor's fees from the owner. The fees were charged at the rate of 2½ per cent. The Court of Appeal affirmed the decision of the Judge at the trial that the owner was not liable. The two next cases are of still closer application. *Evans* v. *D'Oyley Carte* (2) was decided in 1881 by Coleridge, C. J., and Manisty and Bowen, JJ. The architect there had employed the plaintiff as surveyor to reduce quantities. The defendant was admittedly liable to pay for the original quantities. The owner not having proceeded with the building, the surveyor sued him. Coleridge, C. J., was strongly against the custom, and the case was disposed of on the ground that there was evidence of express contract. The decision, to which Manisty, J., was party, is adverse to the notion that the architect is entitled by implication to employ a surveyor on his principal's credit.

The next case, *Priestley* v. *Stone* (3), in 1888, is still more valuable, from the *ratio decidendi* of the Court. The action was by the builder against the surveyor for negligence. Lord Esher held that the action did not lie. His reason was that the architect employed the surveyor and was to pay him ; the contract was either between the architect and surveyor, or the architect's principal, if the latter gave authority—Is not this express authority?—and the surveyor. Lindley, L.J., also held that there was no privity of contract. He thought that the alleged custom was not proved, and that if proved it was not reasonable, referring to *Bradburn* v. *Foley* (4). This case, which is reported at length in Hudson on Building Contracts, vol. II., p. 53, was only before the Court in *North* v. *Bassett* (5), in the short report from the

(1) 2 Hudson, 100.
(2) *Ib.* 10.
(3) *Ib.* 53.
(4) 3 C. P. D. 129.
(5) [1892] 1 Q. B. 333.

Times' Law Reports. In this last case it was held that, though there was no privity of contract, the builder was liable to the surveyor on custom, and the usage was described as sensible and convenient. The judgments do not satisfactorily answer or distinguish the reasoning of the Court of Appeal in *Priestley* v. *Stone* (1). The alleged usage seems to have commended itself to Mathew and A. L. Smith, JJ., but I confess that a usage which led to such results as are exemplified in *Young* v. *Smith* (2) and *Priestley* v. *Stone* (1), hardly seems to me to deserve eulogy. If the owner's money is in the long run directly or indirectly to pay the surveyor, the advantage is not obvious of compelling the builder to pay in the first instance, leaving him to the chance of recoupment, by contract with the owner, while the surveyor loses his fees altogether if the builder is unable to pay from bankruptcy or any other reason. It will be noticed that several of the cases in Mr. Hudson's work are taken from trade and other journals. Such reports can hardly be regarded as possessing authority. Consideration of the above somewhat inconsistent cases shows that it would not be easy, even in England, to lay down that the Court is bound to take judicial notice of the usage as notorious, invariable, and of legal validity. No doubt a Court which is judge of fact and law together (as in *Ex parte Powell* (3)) may find and declare the existence of a usage; but in an action at law it is difficult to withdraw the existence of a recent trade usage from the decision of a jury, especially where the usage may be matter of opinion without examples in practice: *Cunningham* v. *Fonblanque* (4).

Assuming that the alleged usage is established as lawful and binding in England or in London, I am not aware of any authority holding that such usage would by legal implication be deemed to extend to Ireland. Usages are often local. The course of dealing in Belfast may not be the same as that in Cork. To say that a London usage binds Dublin would be nearly as absurd as to insist that a Dublin usage ought to govern London.

I now take up the Irish cases. They seem hardly sufficient to make it the duty of the Court to proclaim the alleged usage as

(1) 2 Hudson, 53.
(2) *Ib.* 100.
(3) 1 Ch. D. 501.
(4) 6 C. & P. 44.

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now sanctioned by law, and no longer requiring to be proved. In *Taylor* v. *Hall* (1) the surveyor sued the builder. The facts are rather special, and the evidence is set out in the report at considerable length. At p. 470 the plaintiff stated the custom to be that if no tender was accepted the owner was liable for 1½ per cent. fees on what he described not as the lowest, but as the lowest *bona fide* tender. Mr. Dudgeon's evidence was that if all tenders were rejected the builder who made the lowest tender was liable. Such a usage would be indeed marvellous. Mr. Gribbon, a building surveyor, stated the custom of the trade under which the owner was ultimately the person who paid the fees, but he added that the question really depended on the contract between the builder and employer. The jury found for the plaintiff, the questions left to them being based apparently on contract. The judgment of the Court, in *banc*, was given by Morris, J., who was of opinion that there was no sufficient proof of any such legal custom as the plaintiff relied on. He considered that there was a general habit, and that when the builder included the fees in his tender he must pay, apparently on the ground of contract. The Court decided that the plaintiff's case failed on custom and contract alike. Monahan, C. J., appeared to think the usage was established; but his recollection of the evidence seems to have been imperfect, and the anomalous and uncertain character of the usage was not noticed in his judgment. The decision of the Common Pleas was reversed by a majority in the Exchequer Chamber (2). The judgments, if any were given, are not reported. The case, as counsel have informed us, was compromised on the terms that the plaintiff should receive a small sum without costs.

The next case, *Gribbon* v. *Moore* (3), was one at Nisi Prius in the year 1869, the date of *Taylor* v. *Hall* (1), brought by Mr. Gribbon against a building owner. It would appear that the owner had agreed to the plaintiff's employment. Monahan, C. J., tried the case, and it is interesting to compare his notion of the custom with that of Gribbon himself, as witness in *Taylor* v. *Hall* (1). The Judge said the custom had been proved by half a dozen witnesses. The

(1) I. R. 4 C. L. 467. (2) I. R. 5 C. L. 477. (3) 2 Hudson, 14.

jury thereupon pronounced that it was waste of time to go on. Counsel made the case that the defendant had instructed the architect that he was not to pay the plaintiff's fees. There was a verdict for the plaintiff. The tenor of this newspaper report makes it impossible to regard it as a reliable record of a serious adjudication upon the existence and legality of the usage.

The last Irish case that I know of was *Antisell* v. *Lidwell* (1), which came before me in February, 1896, on appeal from the Recorder. A great many witnesses were examined. I stated a case which this Court decided in favour of the defendant. The action was brought for fees against the defendant, a builder, on custom and on contract. I have procured a copy of the case stated from which I take the following extracts:—"It was admitted that the plaintiff was entitled to maintain an action of contract, but the defendant disputed his liability, save to the extent that his tender was accepted and carried out. The following facts were proved:—The usual and regular course is for the building surveyor to be paid by the employer, in which case the builder is not liable. Where (as in this case) the quantities are taken out at the surveyor's risk, the surveyor is paid by the builder, who usually provides for the item in his contract with his principal. Evidence of custom was given that if the tender was rejected, and a modified tender by the same person was accepted, the fees should be paid by the builder on the original, and not on the reduced amount; and it was stated that if the original tender was for £10,000, and only £5 was actually accepted and carried out, the builder was liable for fees on £10,000, though he might have no right of recoupment against his principal. I found no such custom (even if legal) proved. Each case seemed, under circumstances like the present, to depend on its own facts, and on the particular contract . . . The first tender was for £1405, which was rejected and replaced by a second tender; and finally a third tender for £1050 was made and accepted, certain items in the original works being omitted . . . The question for the opinion of the Court is whether fees should be allowed on the original amount of £1405, or on the reduced amount, on the true con-

(1) Not reported.

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struction of the contract and accepted tender." I state the facts—not in reference to the contract, but as to the custom—at some little length, as the case offers a curious specimen of usage. Though it was supported by the testimony of many respectable witnesses, I thought the alleged custom was unreasonable. How could the builder by implied contract require the owner to repay him the fees on the rejected tender, when there was no contract between them as to such tender? It was not pretended that there was any custom binding the owner in such case to indemnify the builder. Would it not be manifestly unjust to require the builder to pay the surveyor's fees out of his own pocket? It will be observed that the ordinary course of dealing with regard to the surveyor's remuneration as found by the case—whether rightly or wrongly—is hardly consistent with the usage alleged in this action. The admission that the builder could be sued in contract—though in accordance with the view of Morris, J., in *Taylor* v. *Hall* (1)—was wrong if the opinion of the Court of Appeal in *Priestley* v. *Stone* (2) is correct.

The only tangible support of the existence of the alleged custom in Ireland is the *dictum* of Monahan, C. J., in *Taylor* v. *Hall* (1) (where the other members of the Court took a different view), and the opinion of the same Judge in *Gribbon's Case* (3) at Nisi Prius. What view was taken by the Exchequer Chamber in *Taylor* v. *Hall* (1) can only be matter of speculation, as the judgments are not reported. The decision may have gone on contract, and cannot be accepted as affirming the validity and perpetual obligation of the alleged custom.

In my opinion, if the plaintiff here had adduced no evidence of usage, so far from the Judge directing the jury to take notice of the usage as of legal obligation, he would have been bound to direct against it, and could only have left to the jury the scope of the architect's authority.

III. The evidence of usage adduced by the plaintiff was loose and inconclusive. Mr. Beardwood was obviously disbelieved. Butler, himself a surveyor, stated that the usage was of universal application—evidence not easy to reconcile with the language of the

(1) I. R. 4 C. L. 467. (2) 2 Hudson, 53. (3) 2 Hudson, 14.

building rules introduced in 1896. Mr. Beardwood's evidence plainly implies that the usage did not extend to houses under a certain value. O'Connor's evidence for the defendant was important, and agrees with much of the testimony in *Taylor* v. *Hall* (1). I fail to see how the question of usage could have been withdrawn from the jury.

IV. In many cases the employment of a quantity surveyor is doubtless essential. But has the architect by implication a right to employ him without his principal's sanction, and does the employment necessarily involve that the principal is to pay him? How can the scope and extent of the architect's authority be made a matter of direction? Lord Esher in *Priestley* v. *Stone* (2) thought there was no necessary implication of authority. Even if the owner acquiesces in the quantities being taken out, does he thereby pledge his own credit? The plaintiff's evidence as to custom in this branch of the case tells against him. The existence and nature of the alleged usage are rather inconsistent with the implication of contract. The builder is not bound to the surveyor by contract. If the architect, as one of the necessary acts authorised by his employment, can engage a surveyor, why is not such architect the principal's agent: *Scrivener* v. *Pask* (3)? Why does he not get payment from his supposed principal directly? And why is not such principal liable when the builder fails to pay: *Young* v. *Smith* (4)? Plaintiff's counsel rely on the supposed analogy of the master of a ship in whom the law in certain cases implies an authority to bind his owner. But there is no analogy: such authority arises from necessity, and there is no necessity, and therefore no authority, where the owner can be consulted, and his directions obtained: *Gunne* v. *Roberts* (5); *Acatos* v. *Burns* (6).

The conflict here has arisen from an attempt to dispense with contract, and to impose liability on the owner by usage. Where there is contract, custom is not wanted. The evidence points rather to a practice or habit in making particular express contracts than to a binding custom superseding the necessity of contract.

(1) I. R. 4 C. L. 467.
(2) 2 Hudson, 53.
(3) 18 C. B. (N. S.) 785; L. R. 1 C. P. 715.
(4) 2 Hudson, 100.
(5) L. R. 9 C. P. 331.
(6) 3 Ex. D. at 291.

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A certain form of contract may be usual without there being a usage. I see no reason for disturbing the verdict on what was peculiarly a jury question. The defendant, therefore, is not liable, whoever else possibly may be.

SIR PETER O'BRIEN, L. C. J. :—

The jury found everything in favour of this lady, the defendant, Mrs. Doyle, who it appeared was a successful publican and had realized a large fortune in that trade. She had been at one time desirous of embarking on a very extensive building enterprise, and with that object had employed an architect who, in his turn, had engaged the plaintiff as a quantity surveyor with a view to invite tenders. Tenders were invited by the architect and sent in to him; but the defendant, Mrs. Doyle, subsequently declined to proceed any further in the matter, and the plaintiff now sues her for work done.

Mr. Justice Madden, at the trial, was so dissatisfied with the verdict of the jury that he refused to enter the verdict for the defendant, and certified that in his opinion the verdict was entirely against the weight of evidence. I myself do not think that the trial was satisfactory, and, in my opinion, there should be a new trial. That is the conclusion at which I have been forced to arrive; and the question which, in my judgment, should be put to the jury in the present case is this: whether the defendant authorised the architect to obtain tenders; for, if the defendant authorised the architect to get tenders, and as tenders could not be made without quantities, she impliedly authorised him to get the quantities taken out. *Varium et mutabile semper femina*—one of the best known lines in Virgil—may correctly describe the disposition and, I might say, the prerogative, of the defendant's sex; but the prerogative of fickleness, though recognised no doubt in the region of sentiment, does not necessarily secure immunity for a lady if she changes her mind in the matter of building contracts. As I have stated, the appropriate question for a jury to consider would be whether in fact the defendant had authorised the architect to procure tenders. That tenders came in there is no doubt; and it is to be presumed that no one expected the lady would change

her mind and not go on with the buildings. The law as laid down, in *Waghorn* v. *Wimbledon Local Board* (1), by Mr. Justice Manisty seems to me to be very good sense, and is, I think, borne out by other cases. There, the defendants, a burial board, by resolution instructed their architect to prepare plans and get tenders for a cemetery chapel. The architect employed the plaintiff, a quantity surveyor, to take out quantities. The work went to tender; but, none being accepted, the plaintiff sued the defendants, who set up the case that they never authorised the architec to employ the plaintiff, and that as a corporation they must con tract under seal; but Mr. Justice Manisty ruled that, as the defendants had instructed their architect to get tenders, they impliedly authorised him to get quantities taken out, and that the defendants were accordingly liable to the plaintiff, the surveyor, for the work done. The same view is also adopted in *Gwyther* v. *Gaze* (2), where the defendant, intending to erect a warehouse, employed an architect to prepare plans; and the architect employed the plaintiff to take out quantities. Tenders were sent in, but none were accepted, and no building was erected. The plaintiffs sued the defendants for 2½ per cent. on the lowest tender, and the defendant contended that the architect had only a limited authority. Mr. Justice Quain left it to the jury to say whether the architect's authority was so limited; and charged them, if his authority was not so limited, that the defendant was liable to pay to the plaintiff a reasonable remuneration. The charge of the learned Judge proceeded upon the basis that there was an implied authority to engage a quantity surveyor, who would be entitled to a reasonable remuneration.

The next case to which I should wish to refer upon this matter is one in this country—*Taylor* v. *Hall* (3)—in which Lord Morris, who delivered the judgment of the Court, expressed his view in the clearest terms. He says: "The case of *Moon* v. *Witney Union* (4) decides that if the employer of an architect prevents the building going on, he is liable for the surveyor's fees." In the present instance Mrs. Doyle, undoubtedly, according to the view that I

(1) 2 Hudson, 87.
(2) *Ib.* 16.
(3) I. R. 4 C. L. 467; I. R. 5 C. L. 477.
(4) 3 Bing. N. C. 814.

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take of the facts, prevented the building going on. I have no shadow of doubt that she was aware that tenders were being received. There is no doubt a controversy as to whether she knew that she was to pay if the contract was not carried out; but this had reference to a later period, and, in my opinion, there is the strongest evidence that she authorised tenders to be procured. In the case from which I have been citing, *Taylor* v. *Hall* (1), Chief Justice Monahan, a very distinguished Judge, expressed his opinion to the same effect, his judgment being delivered last, apparently because the action had been tried by him. He says: "No doubt, a usage exists in the building trade here and in England, to the effect that, if an architect is employed to prepare plans of a contemplated building, and obtain proposals for the execution of the work, he employs a surveyor, such as the plaintiff Taylor, to make out the quantities, so as to enable the builder to calculate for what sum he can execute the work; and a copy of the calculation so made by the surveyor is supplied to each builder who intends to send in a tender for the execution of the work; and, no doubt, an express or implied contract is made by each builder who so obtains the surveyor's calculations, that, if he is the successful candidate whose proposal is accepted, he is the person to pay the surveyor his fees. Of course, he takes care that he is reimbursed the payment made by him to the surveyor by the owner of the works—the item being usually expressly included in his proposal, or, if not expressly, it is in some other way included, as by charging higher prices. If no tender is accepted, or if, for any reason, the owner changes his mind, and no contract is entered into with the builder, the owner is, of course, liable to the surveyor, he being the person for whom the work has been done, and the architect having the express or implied authority of the owner to employ the surveyor." The same view is somewhat peremptorily expressed by the same learned Judge in *Gribbon* v. *Moore* (2).

I desire to refer to one other case—*North* v. *Bassett* (3)—to which my brother Gibson referred during the argument. The head-note is as follows:—"The plaintiff, a quantity surveyor, was employed by an architect to take out the quantities for a building

(1) I. R. 4 C. L. 467. (2) 2 Hudson, 14. (3) [1892] 1 Q. B. 333.

about to be erected; the defendant, a builder, tendered for the work upon the basis of a specification, containing the following clause:—'To provide for copies of quantities and plans, twenty-five guineas, to be paid to the surveyor' (naming the plaintiff) 'out of the first certificate.' The defendant's tender was accepted, and he received the first instalment of the price of his work from the building owner. In an action by the plaintiff to recover the twenty-five guineas according to the specification, evidence was given that, by the usage of the building trade, the builder, whose tender was accepted, was liable to the quantity surveyor for the amount due for the quantities; but that if no tender was accepted the building owner or architect was liable"; and it was there held "that the usage was reasonable and valid, and that there was evidence of a contract with the plaintiff upon which he was entitled to recover." No doubt, in that case, the builder was the person who was held liable. The tender was accepted, and he was held liable. Here the tender was not accepted through default of the building owner; but the usage, as a whole, seems to have been held good and binding, namely, a usage that if the tender is accepted, the builder is liable, but that if no tender is accepted the building owner or architect is liable. In giving judgment, Mr. Justice Mathew says:—"I am convinced that the Court of Appeal in *Priestley* v. *Stone* (1) never meant to say that the usage set up in this case was a bad one. Had they so decided I should have been bound by that decision. This case is totally different, and the question we have to determine is whether there was any evidence of liability on the part of the defendant to the plaintiff. The plaintiff was a quantity surveyor employed by an architect to take out quantities for a building, for which the defendant's tender was ultimately accepted, and I agree with Field, J., in *Young* v. *Smith* (2), that the result of such employment is that there is not a contract by the building owner to pay the quantity surveyor in any event, but that the latter is to be paid by the builder if his tender is accepted." In a later passage he speaks of the usage as "notorious." In the same case Mr. Justice A. L. Smith says:—"Over and over again I have seen this notorious

(1) 4 *Times'* Rep. 730; 2 Hudson, 53. (2) 2 Hudson, 100.

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usage proved, that the builder pays the quantity surveyor and puts the amount of the fees upon the amount of his tender. First of all, the building owner agrees to hand over the money for the quantity surveyor's fees to the builder, and the builder agrees to hold it for the quantity surveyor, and the latter agrees that he shall hold it. This kind of tripartite agreement is a sensible and convenient one. In my opinion the case is not within *Priestley* v. *Stone* (1); and in a case like the present the quantity surveyor can maintain an action for his fees against the builder."

In the present case I think the evidence given in support of the usage was insufficient to establish it; but the question remains whether, the usage itself has become so notorious as to be incorporated into the law, and to be judicially noticed without proof. On the whole, looking at all the cases, and feeling some misgiving as to the correctness of my opinion, I think the usage has not become so incorporated with the law as to be legally binding without proof. In my opinion, in the case now before us, the question which I have indicated should be put, namely, whether the defendant authorised the architect to procure tenders, and if she did the jury should be told that she impliedly authorised him to engage a quantity surveyor to be paid by her at a reasonable rate. There might, of course, be circumstances in particular cases to rebut the implication I refer to, but I do not think there are, in the present case, any such circumstances. However, if the defendant's counsel thought there were, they could point them out to a jury at a new trial, and it would be for the jury, under the direction of the judge to say whether the implication I refer to was rebutted.

My brethren, however, are of opinion that judgment should be given for the defendant, and it will accordingly be entered for her with costs.

Solicitors for the plaintiff: *Fry & Sons.*
Solicitor for the defendant: *J. D. Clancy.*

J. H. P.

(1) 4 *Times'* Rep. 730; 2 Hudson, 53.

DE MONTMORENCY, LANDLORD; M'ADAM, TENANT (1).

Land Com.
1898.
Dec. 9.

Landlord and tenant—2 Wm. 4, c. 17, s. 2—Land Law (Ireland) Acts, 1881 to 1896—Subletting in breach of covenant.

A lease, made on 7th May, 1832, contained a clause permitting the lessee to sublet the premises to one good and solvent tenant, but not to more than one such tenant at the same time, nor in separate parcels, under a penalty. The holding comprised 142 acres. There were two sub-tenants, one holding 9 acres at £10 a-year rent; and the other holding over one acre at £2 10s. a-year rent. The lessor resided at a distance of about five miles from the holding. No evidence was given that he knew of the existence of, or consented to, the subletting.

Held, that the clause in the lease was one controlling or regulating the subletting of the lands demised within the meaning of the 2nd section of 2 Wm. 4, c. 17; that the sublettings being in breach of the contract of tenancy, sect. 7 (1) (*b*) of the Land Law (Ir.) Act, 1896, did not apply; and that the lessee could not be considered as in *bona fide* occupation. The Court refused to presume a lost deed consenting to the sublettings.

APPEAL from an order of a Sub-Commission Court.

Molony, for the landlord.

Hynes, for the tenant.

The facts appear in the judgment.

MEREDITH, J.:—

The holding comprises 142A. 2R. 17P., the old rent was £132 1*s*., and the Sub-Commissioners fixed the fair rent at £120 9*s*. 6*d*. The legal question to be determined is that of "*bona fide occupation*," within the meaning of the Land Law Acts.

The lands are held under a lease, dated the 7th of May, 1832, made by William De Montmorency to Robert Stannard for three

(1) Before MEREDITH, J., and the Hon. GERALD FITZGERALD, Q.C., Commr.

Land Com. 1898.

DE MONTMORENCY, *Landlord*; M'ADAM, *Tenant*.

Meredith, J.

lives, one of whom is still in being, or thirty-one years, and contained the following covenant with reference to subletting:—"And the said William de Montmorency doth for himself, his heirs, and assigns, covenant, promise, and agree, to and with the said Robert Stannard, his heirs, executors, administrators, and assigns, in manner and form following, that is to say, that he the said Robert Stannard, his heirs, executors, administrators, and assigns shall and may at all times during the continuance of this demise set and underlet the lands and premises hereby demised to one good and solvent tenant, but not to more than one such tenant at the same time, nor in separate parcels," under a penalty.

Having regard to the date of the lease, these provisions are somewhat peculiar. I think it is manifest that the draftsman had not very fully before his mind the repeal of the Subletting Act of George and the fact that the second Subletting Act had been passed. The provisions of the lease are more applicable to a case coming within the earlier than the later Subletting Act. However, the second Subletting Act governs the case, and it is somewhat more elaborate in its terms than the statute of 1860, known as Deasy's Act. The Act of Wm. 4 provides in sect. 2: [His Lordship read the section.]

The wording of sect. 18 of the Act of 1860 is not so comprehensive, though the section has been held to have the same operation and effect as the 2nd sect. of the Act of Wm. 4. The words are "where any lease has been or shall be made containing an agreement against subletting or letting in conacre, the benefit of which has not been waived, &c." The words in the earlier statute are "contain any condition, clause, or covenant prohibiting, controlling, or regulating the assigning or subletting." Now the clause I have read from this lease is certainly a clause controlling or regulating the subletting of the lands demised, and it is further (in my judgment) a clause *prohibiting* subletting, save in a particular way and under specified conditions. The subletting expressly authorised by the lease is a subletting of the entire premises to one good and solvent tenant, but not to more than one such tenant at the same time, nor in several parcels.

A case arose under the 10th section of the Act of 1860 (which speaks of "an agreement restraining or prohibiting assignment"):

Coffey's Estate (1), which came before Judge Lynch. At page 52 of the report Judge Lynch says:—"In my opinion, restraining means in restraint of the Common Law right of alienation, establishing certain specific conditions under which alienation is to take place; and it means, not prevention, but that the act must be done under conditions imposed by the landlord, or rather agreed upon between him and his tenant, and any act done in violation of such agreement is unlawful, and therefore void." In my judgment these observations apply with equal force to the second section of the statute of William, and accordingly the clause in the lease to which I have referred (which under certain specified conditions expressly authorizes subletting) must be read as a clause prohibiting any other subletting. Now what are the facts here? The facts are that there are two subtenants upon this holding: one is Michael Cahill, who holds nine acres at a rent of £10 a-year, the other is William Carey, who holds 1A. 3R. 20P., at £2 10*s*. The consent of the landlord to these sublettings has not been obtained. In itself—though Carey has been there for a very considerable time—in itself, Carey's subtenancy would probably be trivial, and one that would not interfere with the fixing of a fair rent. But Cahill stands in an entirely different position. Notwithstanding the able argument of Mr. Hynes on behalf of the tenant, we cannot regard Michael Cahill as anything but a subtenant. No doubt his rent is now paid in labour; but the tenancy originated in an entirely different way. Cahill's father was tenant of the nine acres, an ordinary tenant paying rent in money, £10 a-year. The subtenancy was in existence for many years prior to 1872.

In 1872 Mr. M'Adam's herd died, and Cahill was employed as herdsman in his place. Since 1872 the tenant of the nine-acre holding has acted as herd and the rent of the holding has been paid in labour, but beyond all doubt the letting is not a letting to a labourer or anything of the sort, for the sub-tenancy was created under the circumstances I have mentioned.

It is impossible in my judgment to regard these two sublettings as trivial, or indeed to regard Michael Cahill's letting of 9 acres at £10 a-year, as trivial, and therefore before the Land Act of 1896,

(1) I. R. 4 Eq. 47.

Land Com. 1898.

DE MONTMORENCY, *Landlord*; M'ADAM, *Tenant.*

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it would not have been possible for the tenant to fix a fair rent. The tenant now says that the 7th section of the Act of 1896 has altered the law in his favour and that he is entitled to come in under subsection 1 (*b*), which provides that a tenant shall be deemed to be in *bona fide* occupation, notwithstanding that any other part of the holding is, otherwise than in breach of the contract of tenancy or of a statutory condition, sublet to or in the occupation of another person, if in the estimation of the Court a part not less than seven-eighths or thereabouts in value of the holding, excluding from such value the value of any buildings erected by the tenant, remains in the *bona fide* occupation of the tenant, &c. Mr. Molony, for the landlord, says that is an excellent subsection when it applies, but the difficulty in the way of the tenant in this particular case is that the words, "otherwise than in breach of the contract of tenancy" appear in the subsection. Mr. Molony admits that the tenant would have a perfect case on the seven-eighths if it were not for those words; but he contends that the subletting in the present case to two persons in separate parcels was and is in breach of the provisions of the contract of tenancy, of the conditions of the lease, of the clause which regulates and controls the subletting of the lands demised, and which in my view, as already stated, prohibits any subletting, except a subletting of the entire premises to one person only. I think Mr. Molony's argument is unanswerable; at least I see no answer to it. The 7th section only applies where the subletting is not in breach of the contract of tenancy. These sublettings are in breach of the contract of tenancy; that being so, and it being impossible to treat the sublettings as trivial we must reverse the decision of the Sub-Commissioners and dismiss the originating notice upon the ground that the tenant having sublet, is not in *bona fide* occupation of the holding within the meaning of the Land Acts.

There is another point to which I must allude: Mr. Hynes contended, that following the decision of the Land Commission in *Stevenson* v. *Parker* (1), and *Robinson* v. *Wakefield* (2), we ought to hold that there had been a release by the landlord or a waiver under seal of the provisions in the lease—a lost deed of some kind

(1) [1895] 2 I. R. 504. (2) [1896] 2 I. R. 194; [1897] 2 I. R. 130.

sufficient to meet the exigencies of the tenant's case. Well *Stevenson* v. *Parker* (1), went to the Court of Appeal, and the Court of Appeal held that the Land Commission ought not to have presumed any such release or waiver—that there was no evidence in the particular case of any such release or waiver.

In *Robinson* v. *Wakefield* (2) (which also went to the Court of Appeal) the Court held that there was an actual and sufficient consent in writing by the agent, so it was not necessary to presume any lost consent. Bewley, J., merely remarked that, if the consent of the agent were not sufficient, the Court would be prepared to presume a lost consent. The Court of Appeal did not refer to the point. The facts in *Robinson* v. *Wakefield* (2) were very different from the facts in the present case. All I desire to say in the present case is, that there is no evidence that the landlord ever consented to the creation of either of the subtenancies, or that he ever knew that these subtenancies were in existence. There is no doubt the landlord did not reside very far from the property, but it rather startles one to be asked to hold that, because a landlord lives within five miles of a holding of this description, he is to be assumed to know that there are subtenants upon it, and that there is then (if the case requires it), to be a further presumption that he executed a deed releasing the tenant from the consequences of his breach of covenant. At all events we hold in the present case that there is no evidence upon which we ought to presume, or could presume, the existence of any release or waiver under seal, or lost deed of any description.

There is just one more observation I desire to make—one further remark in reference to a different point. If the tenant were not excluded from the benefit of the Land Acts in consequence of the subletting point, it would seem to me to be a very doubtful and difficult question indeed as to whether he would not be excluded upon another ground. Rarely has persistent and consistent deterioration of valuable land been more clearly and conclusively proved than it has been in the present case. A return handed in by Mr. Molony of the sales of meadow for a period of years from 1892, down to the present

(1) [1895] 2 I. R. 504. (2) [1897] 2 I. R. 130.

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DE MONTMORENCY, *Landlord*; M'ADAM, *Tenant.*

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time, is a very remarkable document indeed, and demonstrates to my mind that the value of the land has been falling year after year, owing to the fact that this overmeadowing has been going on, with the result that land which was worth £5 an acre in 1892, is, in 1898, worth less than £1 an acre. However, as the tenant is not in *bona fide* occupation, it is not necessary for us to determine whether in this particular case we could have fixed a fair rent, or whether in fixing a fair rent we must not have restored the old rent. It is sufficient to say the tenant is not at present entitled to have any rent fixed at all, having regard to the sublettings. If he gets rid of the sublettings and serves a fresh notice the question of depreciation will have to be decided.

Solicitor for the landlord: *George H. Lyster.*
Solicitor for the tenant: *Joseph M'Dermott.*

W. C. S.

IN RE THE KILWORTH RIFLE RANGE AND THE DEFENCE ACTS, 1842 TO 1873, AND THE RANGES ACT, 1891. H. M. PRINCIPAL SECRETARY OF STATE FOR WAR *v.* THE COUNTESS OF KINGSTON (1).

Q. B. Div. 1897. Nov. 9.

The Defence Acts, 1842 *to* 1873—*Lands Clauses Consolidation Acts—Assessment of compensation for lands compulsorily acquired—"Interest" of land owner—Arrears of rent due—"Incumbrance"—Costs of prior abortive arbitration.*

Arbitrators appointed under the Lands Clauses Consolidation Acts for the purpose of assessing compensation to be paid for lands compulsorily taken for the defence of the realm, *held,* not to be entitled, in assessing the value of the owner's (or reversioner's) interest, to take into account the existence of arrears of rent, due by lessees or tenants, which that taking rendered irrecoverable; nor entitled to award to the owner, as part of the costs of the arbitration, costs of a prior abortive arbitration purporting to be held under the Railways (Ireland) Acts.

SPECIAL CASE, stated for the opinion of the Queen's Bench Division, in and as part of his award, by an umpire appointed under the Lands Clauses Consolidation Act, 1845, in the above matter.

On the 16th February, 1895, the Secretary of State for War gave notice to the present applicant (the Dowager Countess of Kingston), and to the other interested parties, that he required certain lands (the "Kilworth Rifle Range") for the public service, and offered £3968 7*s.* 5*d.* for the absolute purchase of same, not, however, offering any specific sum for the applicant's interest therein, as owner of the fee; he also gave notice that, in case of non-acceptance of this offer, the necessary steps would be taken under the Defence Acts, 1842 to 1873, for obtaining immediate possession thereof, and that he would require that the compensation for the premises should be settled by arbitration, pursuant to section 11 of the Ranges Act, 1891, and not by reference to a

(1) Before PALLES, C.B., and O'BRIEN and JOHNSON, JJ.

Q. B. Div. 1897.

In re KILWORTH RIFLE RANGE

jury; and further, that he would take all necessary steps to have an arbitrator appointed pursuant to the statutory powers in that behalf to determine the amount of the compensation to be paid. Possession of the lands was taken, under the provisions of the Defence Act, 1842, on the 29th July, 1895.

The Principal Secretary proceeded, in the first instance, under the provisions of the Railways (Ireland) Act, 1851, to appoint an arbitrator (Mr. Abbott), and certain steps were taken before such arbitrator involving sundry costs. On the 2nd June, 1895, the Court of Appeal, affirming the decision of the Queen's Bench Division in *Reg.* (*Moore*) v. *Abbott* (1), having decided that the mode of procedure so adopted was wrong, this attempted arbitration fell through. Subsequently, adopting the procedure under the Lands Clauses Consolidation Act, 1845, the Secretary of State for War and the Countess of Kingston appointed each an arbitrator to determine the amount of the purchase-money and compensation to be paid to her for her interest in the lands. These arbitrators having appointed S. Ussher Roberts, C.B., to act as umpire between them, an inquiry was held, on the 8th December, 1896, into the claims made on the Countess of Kingston's behalf, and "having heard what was alleged and proved and admitted and agreed by both parties as to the amount of the lands to be taken which were in the occupation of tenants, and the loss of rent resulting from such taking, and as to the amount of the lands which were in the occupation of the Countess of Kingston, and of the value of the timber on the said lands in the Countess of Kingston's occupation, and as to the value of the right to shoot game over the whole of the lands taken, and as to the arrears of rent due on holdings taken or partly taken by the said Principal Secretary, and of the costs incurred by the said Countess of Kingston in respect of the hereinbefore mentioned abortive attempt at arbitration," the umpire made his award "that there is due from the said Principal Secretary to the said Countess the sum of £2023 5*s.* 10*d.*, for the purchase-money of the said premises, and for the severance and all other consequential damage, other than and except the loss of certain arrears of rent hereinafter mentioned."

(1) [1897] 2 Ir. R. 362.

The award then set out that "the arrears of rent due by tenants of the holdings taken or partly taken, on the day when possession was so taken by the said Principal Secretary, amounted to £183 7*s.* 9*d.*"; that "it was contended on behalf of the said Countess of Kingston that such arrears should be included in this award, and also the costs incurred by the said Countess of Kingston in and about the said abortive attempt at arbitration" (£50, subject to taxation); that the Principal Secretary had requested the umpire to state a case for the opinion of the High Court in regard to these matters; and that the umpire accordingly now did so, embodying such case in his award, and submitting for the opinion of the Court, upon the facts as above stated, the questions—1, Whether he was at liberty to take into account the value of rents in arrear by tenants of holdings taken or partly taken, on the day when possession was taken by the said Principal Secretary, "as forming part of the compensation to which the Countess of Kingston was entitled, on the ground that in fact such rents became irrecoverable by reason of such taking possession;" and, 2, whether he was at liberty to award the costs of the attempted arbitration under the Railways Act, 1851, as part of the costs incurred by her in respect of the hereinbefore mentioned award [the Countess, inasmuch as the sum awarded was greater than that offered, being declared by the umpire to be entitled to her costs of, and incident to, the arbitration before him].

Vesey Fitz Gerald (*Wright, Q.C.*, with him), for the Principal Secretary of State for War:—

This matter comes before the Court as a case stated by the umpire, under section 8 of the Common Law Procedure (Ireland) Act, 1856: see *Bidder* v. *N. Staffordshire Railway Company* (1).

As to the claim for arrears alleged to be now irrecoverable, this cannot be brought within the words of sect. 63 of the Lands Clauses Act, 1845. The landlord still has his personal right of action against the tenants. No such claim as this has ever been put forward, save in *Ex parte Carey* (2), a case in the Rolls Court (Ireland) in the year 1846. There Carey, the tenant of certain

(1) 4 Q. B. D. 412. (2) 10 L. T. (O. S.) 37.

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lands taken by the Great Southern and Western Railway Company, moved before the Master of the Rolls for payment out of Court to him of a fund lodged in Court by the Company as compensation for the tenant's interest in a portion of his holding taken by the Company under their compulsory powers; the landlord appeared and contended that the money ought not to be paid out until the tenant had discharged a considerable arrear of rent due out of the entire holding, partly outstanding when possession had been taken, and partly falling due subsequent to that date; and that the lands so taken being absolutely discharged from liability for the rent, and distress or ejectment being no longer available, the Court should hold that the fund in Court represented, and was in substitution for, the land taken, and subject to a lien for arrears due. The Master of the Rolls, however, allowed the money to be paid out, saying that this claim was unfounded and unprecedented, and that he would leave the landlord to recover by ejectment against the remainder of the lands not taken, or by personal action against the tenant. The provisions of that Company's Private Act (7 & 8 Vict. c. cxxx.) as to compensation were in identical terms with those of the Lands Clauses Act, 1845.

As to the costs of the proceedings taken under the Railways (Ireland) Act, 1851, these cannot form part of the costs of the arbitration under the Clauses Act of 1845, nor are they the subject of compensation under the Act. [Counsel also referred to *Byles & Ipswich Dock Commissioners* (1)].

E. Morphy, and *R. E. Meredith*, *Q.C.*, for the Countess of Kingston:—

As to the arrears, they are an "incumbrance" on the lands: see *Re London Street, &c., Railway Act*, 1881 (2); they form portion of the landlord's "interest" in the lands taken within section 63 of the Lands Clauses Act. It must be assumed, on the statement in the award, that they are absolutely irrecoverable; distress is impossible; ejectment impossible.

The case of *Harvey* v. *Harkin* (3) in this Court, and *M'Sheffry* v. *Doherty* (4), show the difficulties that encounter the landlord. The

(1) 11 Exch. 464.
(2) 57 L. T. (N. S.) 673.
(3) [1898] 2 I. R. 65.
(4) [1897] 2 I. R. 191, 210.

compensation, therefore, to which the respondent is entitled must include a consideration of this loss; for "the *value* of such lands or of any interest therein," and "the compensation to be paid in respect thereof," are to be measured by the owner's loss by the taking, not the gain to the purchaser: *Stebbing* v. *Metropolitan Board of Works* (1).

As to the costs in dispute, the award is made under the identical notice under which the War Department brought the respondent before an arbitrator under the Railways Act of 1851. There has been but one proceeding throughout, the abortive arbitration being merely a step in that proceeding—a wrong step admittedly, but one taken, not by the respondent, but by the Secretary for War—and the arbitrators and umpire have full powers in regard to "the costs of and incident to the arbitration": section 34 of the Lands Clauses Act, 1845.

George Wright, Q.C., in reply.

[Counsel also referred to *Sharpe* v. *Metropolitan District Railway Company* (2), and *Ayr Harbour Trustees* v. *Oswald* (3)].

THE COURT held, upon the first point—whether the arbitrator, in assessing the value of the interest of the Countess of Kingston in these lands, was entitled to take into consideration that there were certain arrears of rent due to her by tenants, now perhaps irrecoverable—that the duty of the arbitrator was to value the land, *qua* land, irrespective of the collateral circumstances attending on the particular persons, owners of that land; that, in ascertaining the value of the reversion, the arbitrator could not take into account the question whether arrears of rent were due or not; and that, from the moment the money became due, it became severed from the reversion, and was not an "interest" in the land within the meaning of the Lands Clauses Acts. The Court declined to express any opinion, one way or the other, whether the arrears of rent were or were not a charge or incumbrance, within the meaning of the Acts, upon the sum of money, whatever it might be, which had been allowed by the arbitrators

(1) L. R. 6 Q. B. 37, 43. (2) 4 Q. B. D. 645. (3) 8 App. Cas. 623.

Q. B. Div. 1897.

In re Kilworth Rifle Range

in respect of the interest of the lessees or tenants. Upon the second point, the Court held that the costs of an abortive arbitration, under a wrong Act, could not be deemed costs of an arbitration under the Lands Clauses Acts, *i.e.* of an arbitration in pursuance of those Acts and no other. Both questions were therefere answered in the negative.

Solicitor for the Secretary for War: *The Chief Crown Solicitor.*
Solicitor for the respondent: *St. Leger.*

A. E. R. J.

Q. B. Div. 1898.
June 4.

REG. (HEGARTY) *v.* DIVISIONAL JUSTICES, DUBLIN METROPOLITAN DISTRICT (1).

Summary jurisdiction (Dublin Police District)—7 Wm. 4. & 1 Vict. c. 25—Appeal—Recognizance—Prevention of Cruelty to Children Act, 1894 (57 & 58 *Vict. c.* 41), *s.* 19—*Mandamus.*

Where a person is convicted and sentenced, under the Prevention of Cruelty to Children Act, 1894, by a magistrate acting under the special jurisdiction of the Dublin Police District (7 Wm. 4. & 1 Vict. c. 25), and serves notice of appeal to Quarter Sessions, not "at the time of" conviction, though as soon as conveniently possible thereafter, the notice of appeal is good; but there is no power in the magistrate to allow the prisoner out on bail pending the appeal, nor any authority in the Queen's Bench Division, on mandamus, to order the discharge from custody of such prisoner undergoing sentence (not set aside) of a competent Court.

Mandamus.

A woman named Hegarty was summoned before Mr. Carton, Q.C., one of the Dublin Metropolitan Police Magistrates, under 57 & 58 Vict. c. 41, s. 19, on a charge of cruelty to her children.

The case was heard on the afternoon of the 10th May, 1898, and an order made at about 4.30 p.m. sentencing the defendant to three months' imprisonment. The offices closed about that time, and the prisoner's solicitor could not have served formal notice of

(1) Before Palles, C.B., O'Brien and Johnson, JJ.

appeal that day. Next day (the prisoner having meanwhile been committed to prison under the magistrate's warrant) her solicitor brought a notice of appeal to the magistrate's clerk, and had a discussion with him in reference to it, but the notice was not formally served until the day following. The magistrate was then of opinion that he had no jurisdiction to allow recognizances to be taken or to allow the prisoner out on bail on the ground that the provisions of sect. 27 of the Dublin Police Act, 1837 (7 Wm. 4. & 1 Vict. c. 25) were not either expressly or impliedly made applicable to appeals under 57 & 58 Vict. c. 41, and on the further ground that the appeal had not been taken at the time of conviction. The present application was thereupon made for an order in the nature of a mandamus, directed to the magistrate to allow the prisoner out on bail, upon sufficient recognizances being entered into, pending the hearing of the appeal.

Rynd, for the applicant.

Morphy, for the Crown.

The Dublin Police Act, 1837 (7 Wm. 4. & 1 Vict. c. 25), by sect. 27, provides that no conviction thereunder shall be quashed for want of form, "but that, in all cases where the penalty shall exceed the sum of £5 or one month's imprisonment, if any person shall think himself or herself aggrieved by such conviction, such person may appeal to the Justices of the Peace at the next General or Quarter Sessions . . . . such person, at the time of his or her conviction, entering into a recognizance with two sufficient sureties conditioned personally to appear at the said sessions to try such appeal, and to abide the further judgment of the Justices at such Sessions assembled; and it shall be lawful for the Justice before whom such conviction has taken place to bind over the witnesses who shall have been examined in proof of such offence in sufficient recognizances to attend and be examined at the hearing of such appeal. . . . "

The Prevention of Cruelty to Children Act, 1894 (57 & 58 Vict. c. 41), by section 19, provides that "when, in pursuance of this Act, any person is convicted by a Court of Summary Jurisdiction of an offence, and such person did not plead guilty or admit

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the truth of the information, . . . he may appeal against such a conviction . . . . in England and Ireland to a Court of Quarter Sessions. . . . "

The Petty Sessions (Ireland) Act, 1851 (14 & 15 Vict. c. 93) does not extend to the Police District of the Dublin Metropolis, nor "alter or affect in any way whatsoever any of the provisions or enactments contained in" the Acts regulating the same: see section 41.

THE COURT was of opinion that if, as was submitted by counsel for the prisoner, the case was governed by the Act, 7 Wm. 4. & 1 Vict. c. 25, the appeal was too late; but held that that Act did not apply; and held that, an appeal being given in unlimited terms by section 19 of the Act of 1894, it was impossible to contend that the effect of section 19 of the Act of 1894 was to extend section 27 of the Act 7 Wm. 4. & 1 Vict. c. 25 to the new offences then for the first time created; that, in the result, therefore, a good and valid appeal had been taken, which the prisoner had a right to prosecute at Quarter Sessions; but that there was no provision in the statute enabling the police magistrate to discharge the prisoner from custody pending appeal, nor any authority in this Court to order the discharge of a prisoner from custody upon bail, when such prisoner was undergoing sentence under a conviction not set aside.

The application was accordingly refused (1).

Solicitor for applicant: *M. J. Hanmore.*

Solicitor for respondent: *The Chief Crown Solicitor.*

A. E. R. J.

(1) Application was made, at the suggestion of the Court, as the only remedy, to the Executive, and the prisoner was subsequently discharged from custody pending appeal to Quarter Sessions. On the hearing of the appeal, the conviction was affirmed.—[REP.]

IN RE BALL, A BANKRUPT.

Q. B. Div. Bankruptcy. 1898. Nov. 8. Dec. 6.

Appeal. 1899. Jan. 24, 25, 26. Feb. 17.

Bankruptcy—After-acquired property—Executor—Payment of legacy to uncertified bankrupt—No intervention by the assignees—Liability of executors—Irish Bankrupt and Insolvent Act, 1857, *sect.* 267.

Where a person became entitled to a legacy after he had been adjudicated a bankrupt; and, before he had obtained his discharge, such legacy was paid to him by the testator's executors, acting *bona fide*, without notice of his bankruptcy, and before any intervention on the part of the assignees in bankruptcy to assert title to the legacy for the benefit of the creditors of the bankrupt:—

Held, by the Court of Appeal (reversing the decision of Boyd, J.), that the executors were not liable to the assignees for the amount of the legacy, under sect. 267 of the Irish Bankrupt and Insolvent Act, 1857 (20 & 21 Vict. c. 60).

Herbert v. *Sayer* (5 Q. B. 965) applied.

THIS was an application on behalf of the assignees for a declaration that the legacies bequeathed to the bankrupt by Dorcas J. Teulon, deceased, had become and were vested in them, and that they were entitled to recover from, and be paid the same by, the executors of her will; and for an order that the executors should bring into Court the amount of such legacy.

On the 26th March, 1888, Edward Ball was adjudicated a bankrupt, but at the date of the present proceedings he had not passed his final examination or obtained his certificate.

By her will Mrs. Dorcas J. Teulon, an aunt of the bankrupt, bequeathed to him legacies amounting to £1200. She died on 4th February, 1896, and her will was duly proved by the executors on 15th April, 1896. The legacies were paid by the executors to the bankrupt on 18th May, 1896. Prior to that date, however, it appeared that the executors had advanced a sum of £100 to the bankrupt, and had also paid to certain persons charges created by the bankrupt in their favour on the legacies, so that the actual sum paid to the bankrupt on that date amounted to £1053 17*s*.

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It was not until the 2nd April, 1898, that the assignees became aware of the fact that the bankrupt had become entitled to the legacies. They were informed of this by a letter which they received from Messrs. D. & T. Fitzgerald, dated 1st April, 1898, and which was written by them acting in the capacity of solicitors for the London Guarantee and Accident Company. The bankrupt had been appointed receiver in several matters in the Land Judge's Court, and, having been a defaulter, the Company, who were his sureties, had been obliged to pay over a considerable sum on his account. From inquiries then instituted the assignees also ascertained that the legacies had been paid to the bankrupt.

It was admitted that the executors had acted in a perfectly *bona fide* manner, and that they had no knowledge, when the legacies were paid, that the legatee was an uncertified bankrupt.

Campbell, Q.C., and *Samuels, Q.C.*, for the assignees.

Ronan, Q.C., and *Morphy*, for the executors.

The authorities cited in argument are referred to by Boyd, J., in giving judgment.

Dec. 6.

BOYD, J.:—

On the 26th March, 1888, Edward Ball, described as of 36 Victoria-street, in the City of Dublin, law clerk, was adjudicated a bankrupt, and notice of such adjudication was duly published in the *Dublin Gazette*, and two Dublin newspapers. The debts returned in his schedule amounted to £4533 12*s.* 7*d.*, and his assets to £12, being his household goods, but no sum whatever has been realised. Shortly after his adjudication he left Ireland. No creditor's assignee was appointed in his bankruptcy, and whither he went or what he was doing was unknown to the official assignees. He did not pass his final examination or obtain his certificate.

On the 4th of February, 1896, his aunt, Mrs. Dorcas Jane Teulon, died, and by her will she bequeathed to him legacies amounting to £1200. The will was proved on the 15th April, 1896, by her executors, Townley B. B. Ball (who was an uncle of

the bankrupt and residuary legatee of the testatrix), Wm. F. St. Leger, a solicitor of Fermoy, and George C. Ball Greene. W. W. Carruthers, solicitor, of Dublin, was the solicitor who acted for the said executors, and procured the probate of the said will.

It appears from the evidence of Mr. Carruthers, given before me, and the correspondence furnished by him, that the said legacies were paid by the executors to the bankrupt on or about the 18th of May, 1896. Prior to this date the executors had advanced to him a sum of £100, and the bankrupt had given charges on the legacies to several persons in England, of which the executors received notice, and which were paid by them to the said chargeants, and the sum actually paid by them to the bankrupt amounted to £1053 17*s*. On the 2nd of April, 1898, the assignees in bankruptcy first became aware that the bankrupt had been bequeathed the said legacies. This information was communicated to them in a letter from Messrs. D. & T. Fitzgerald, dated 1st April, 1898. The bankrupt had been appointed receiver in several matters in the Land Judge's Court, and having been a defaulter in said matters his sureties, the London Guarantee and Accident Company, were obliged to pay very large sums on his account. Messrs. Fitzgerald were the solicitors for the said Company, and as such wrote the said letter to the assignees.

From inquiries then made the assignees ascertained that it was a fact that said legacies had been paid to the bankrupt on his receipt as before mentioned.

The case now comes before me on an application by the assignees "that it may be declared that the legacies bequeathed to the bankrupt by Dorcas J. Teulon, deceased, became and are now vested in the assignees in bankruptcy, and that the said assignees are entitled to recover from, and be paid the same by, the executors of the said Dorcas J. Teulon, deceased, and for an order that the executors do bring into Court the amount of such legacies."

This notice has been treated before me by consent as a charge, and the case has been argued as on charge and discharge. The contention of the assignees has been based upon the 267th section of the Bankruptcy Act of 1857, which is as follows:—"When any person shall be adjudged a bankrupt . . . all the personal

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estate and effects of such bankrupt . . . present and future, wheresoever the same may be, and all property which he may purchase, or which may revert, descend, be devised or bequeathed, or come to him before such bankrupt shall have obtained his certificate . . . and all debts due or to be due to him shall become absolutely vested in the assignees for the time being for the benefit of the creditors of the bankrupt . . . and no such bankrupt . . . nor any person claiming through or under him shall have power to recover the same, nor to make any release or discharge thereof, neither shall same be attached as the debt of such bankrupt . . . by any person according to the custom of the City of Dublin or otherwise, but such assignees shall have absolute power and remedy to recover the same in their own names." The section also deals with insolvents, but I have omitted the portions dealing with them as not being applicable to the present case.

The assignees contend that the words of this section are so explicit that they are clearly entitled to recover from the executors the amount of the legacy.

The executors, on the other hand, contend that, as to property in existence at the time of the adjudication, it no doubt vests in the assignees; but as to property which may be acquired by a bankrupt after his adjudication and before he obtains his certificate, a right exists in the bankrupt to deal with it, and that the assignees acquire no right to it, till they intervene and demand possession of it before it has been parted with by the bankrupt to a *bona fide* purchaser for value.

Prima facie, the wording of the above section 267 seems clear and specific, and apparently sustains the claim of the assignees in this case. But several cases have been decided in the English Courts in which the claims of the assignees to after-acquired property of bankrupts have been defeated. It is therefore necessary to consider the terms of the English Acts in force at the times those decisions were pronounced, and also the grounds on which the decisions were based.

The law in bankruptcy has been the subject of several statutes in England, and the wording of the clauses therein relating to the rights of assignees to the property of bankrupts has been considerably altered from time to time.

By the Statute 6 Geo. 4, c. 16, s. 63, it is enacted that "the commission shall assign to the assignees all the present and future personal estate of the bankrupt, wheresoever the same *may be found or known*, and all property which he may purchase, or which may revert, descend, be devised or bequeathed, or come to him before he shall have obtained his certificate, and the Commissioners shall assign, as aforesaid, all debts due or to be due to the bankrupt, wheresoever the *same may be found or known*, . . . and after such assignment, neither the bankrupt nor any person claiming through or under him shall have power to recover the same . . . but such assignees shall have like power to recover the same in their own names, as the bankrupt himself might have had if he had not been adjudged bankrupt."

Section 127, dealing with cases where the bankrupt fails to pay 15*s.* in the £, and shall have obtained his certificate, protects his person from arrest and provides, "but his future estate and effects . . . shall vest in the assignees under the said commission, who shall be *entitled to seize the same* in like manner as they might have seized the property of which such bankrupt was possessed at the issuing of the commission."

When this statute was in force, the case of *Herbert* v. *Sayer* (1) was decided. That case arose upon a demurrer, and the circumstances applicable to it were those provided for by section 127. Chief Justice Tindal, in delivering judgment, expressly bases his decision on the words of the section, "*who shall be entitled to seize the same in like manner*," and says the statutes have protected dealings before the fiat, "but there is no provision by the statute law for such payments . . . after the fiat." This case decides that under the circumstances mentioned and the law as it then stood, a bankrupt had a good title to all property acquired by, and all contracts made with, him, between the fiat and the allowance of his certificate, unless his assignees had interfered, and claimed the property or the benefit of such contracts. To the same effect is also the decision in *Barr's Trusts* (2), in which case the Judge states "it was the duty of the assignees to make inquiry as to the property of the bankrupt, and had they done so they would have discovered its existence as early as 1810."

(1) 5 Q. B. 965. (2) 4 K. & J. 219.

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In the year 1849, a new statute (12 & 13 Vict. c. 106) was passed, establishing a new code of bankruptcy law in England; and by section 141, dealing with the vesting in the assignees of the property of the bankrupt, both present, and "all property which may revert, descend, be devised or bequeathed, or come to him before he shall have obtained his certificate," provides that, after the appointment of assignees, "neither the bankrupt, nor any person claiming through or under him, shall have power to recover the same, nor to make any release or discharge thereof." The case of *In the Trusts of the Will of Mary Coombe* (1) was decided under this statute. In that case, Mary Coombe made her will, dated 30th May, 1840, and the will was proved on 30th March, 1841. By it she devised certain property to Mary Sandes for life, and after her death to De Coombe Sandars. Mary Sandes died on May 1st, 1851. De Coombe Sandars was adjudicated a bankrupt. On 6th May, 1853, De Coombe Sandars, in consideration of £95, assigned his reversionary interest in the fund to the Scottish Amicable Life Assurance Company. Prior to the assignment, the said society inquired of the trustees of the will whether they had received notice of any prior assignment, and they replied that they had not. The assignees in bankruptcy subsequently claimed the fund. In the argument, the trustees relied on *Barr's Trusts* (2), and on *Atkinson's Trusts* (3), but Stuart, V.-C., decided that, under the provisions of the statute of 1849, the assignees in bankruptcy were entitled to the fund. I cannot find that the decision in this case has ever been overruled or questioned.

The words of the 267th section of the Irish Bankruptcy Act are precisely similar to the words in section 141 of the English statute of 1849.

In 1869, and again in 1883, statutes were passed altering the bankruptcy law in England, and the statute of 1849 was repealed. The provisions in these later statutes as to the vesting the estates of bankrupts in their assignees do not contain the negative words in the Irish Bankruptcy Act of 1857, and in the English Bankruptcy Act of 1849. I have been referred to several cases, decided subsequent to the repeal of the Act of 1849, in which it

(1) 1 Giff. 91. (2) 4 K. & J. 219. (3) 2 DeG. M. & G. 140.

was held that the right of the assignees of a bankrupt to property acquired by the bankrupt subsequent to his adjudication, and before he obtained his discharge or certificate, was defeated by an assignment for value by the bankrupt before the assignees intervened to claim the property, and that an uncertificated bankrupt was an agent for the assignees till they disaffirm his acts, and desire the debtor of the bankrupt to pay his debt to them.

In *Jameson* v. *The Brick and Stone Co., Limited* (1), the action was brought by the plaintiff, an undischarged bankrupt, for work and labour done after his bankruptcy. The case of *Herbert* v. *Sayer* (2) was cited on behalf of the plaintiff, and Lord Justice Bramwell in his judgment says:—"This case is concluded by authority. *Herbert* v. *Sayer* (2) is expressly in point. If the trustee does not interfere the bankrupt can sue. *The law which existed at the time Herbert* v. *Sayer* (2) *was decided exists now.*" In *Morgan* v. *Knight* (3), Erle, C.J., says:—"It is also clear that an uncertificated bankrupt may acquire property. This appears from the law which transfers his after-acquired property to his assignees. This law assumes he may acquire property, otherwise there could be none to be transferred; and the result of the cases is not only that he may acquire property, but that he may hold it against all the world except his assignees, and may create rights to hold it against them if *they expressly or impliedly consent* to such property being in his order and disposition at the time of a subsequent bankruptcy." *Ex parte Dewhurst*; *In re Vanlohe* (4) has also been cited. In this case the bankrupt, subsequent to his bankruptcy, and before obtaining a certificate, obtained a situation from which he was afterwards illegally dismissed. It was agreed that he should receive £175 compensation for his dismissal. Out of this sum he paid £130 for rent of his house to his landlord. The trustee in his bankruptcy sought to recover this sum from the landlord. It was held that he could not recover it on the ground stated by James, L.J., that "the trustee *allowed* the bankrupt to receive it." Another case referred to was *Cook* v. *Whellock* (5), but I do not consider

(1) 4 Q. B. D. 208.
(2) 5 Q. B. 965.
(3) 33 L. J. (N. S.) C. P. 168.
(4) L. R. 7 Ch. App. 185.
(5) 24 Q. B. D. 658.

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it has much bearing on the point in this case, as it was merely a question whether an uncertificated bankrupt was compellable to give security for the costs of an action brought by him. In the judgment in *Fyson* v. *Chambers* (1), cited in *Morgan* v. *Knight* (2), the grounds of the decision in *Herbert* v. *Sayer* (3) are stated to be "if the assignees *choose* not to interfere the bankrupt is the right owner."

Again in *Butler* v. *Hobson* (4) the grounds of the decision are stated to be that the assignees *allowed* the bankrupt to retain possession as reputed owner. The decisions in *Ex parte Dewhurst*; *In re Vanlohe* (5), and *Cohen* v. *Mitchell* (6) were given upon the same grounds.

In *Meggy* v. *The Imperial Discount Co.* (7), the decision of the Court of Appeal, consisting of Bramwell, Brett, and Cotton, L.JJ., was in favour of the trustee in bankruptcy on the facts therein mentioned. That case is important on one aspect of the present case when it is contended that the assignees, having in last July obtained an order authorizing them not to claim the money, should not now be permitted to do so. Bramwell, L.J., in his judgment, refers to the question of *laches* relied on against the claim of the trustee, and says—"A good deal of reproach has been levelled at the plaintiff on the ground of his supposed *laches*, but his title is not extinguished unless his *laches* have misled the defendants." In the present case no one has been misled or injured by the *laches* or action of the assignees. It is to be observed that all the above cases relied on by the executors are cases in which the bankrupt was *allowed* by the assignees or trustees to carry on trade before he obtained his discharge, and was in the reputed ownership of the property; and the decisions proceed on the basis that being so allowed he was impliedly their agent, and that therefore they were bound by his acts until they intervened. Besides in all the cases the question arose between the assignees and *bona fide* purchasers for value.

None of these questions arise in the present case. This is not

(1) 9 M. & W. 460.
(2) 33 L. J. (N. S.) C. P. 168.
(3) 5 Q. B. 965.
(4) 4 Bing. (N. C.) 290.
(5) L. R. 7 Ch. App. 185.
(6) 25 Q. B. D. 262.
(7) 3 Q. B. D. 711.

a question as to reputed ownership or agency. Before the executors paid the legacy to the bankrupt the assignees had no notice or knowledge of the fact that the bankrupt had become entitled to the legacy, nor could they by any reasonable diligence have known the fact. The executors, on the other hand, could have easily ascertained the fact of his incompetency to give them a valid receipt for the amount. Section 267 disqualifies the bankrupt from being able to recover the legacy or give any release or discharge thereof. As I have before stated, none of the English Bankruptcy Acts contains these disqualifying words except the Act of 1849, under which *Coombe's Case* (1) was decided. In the case of *Ex parte Ansell* (2), Lord Eldon decided that a legacy left to a bankrupt before he obtained his certificate belonged to his assignees. This was a particularly hard case. The bankrupt had applied for his certificate, and pending the decision on the application the legacy fell in. Lord Eldon, in giving judgment, stated that he "lamented he could not give the legacy to the bankrupt, but whatever interest falls to a bankrupt before his certificate is allowed belongs to his assignees."

On the construction of the 267th section, and on the facts of the present case, I am of opinion that the assignees are entitled to recover from the executors the amount of the legacy as asked in their notice of motion of the 7th November, 1898, and I direct that same be brought into Court to the credit of this matter, and that the costs of the said motion be paid by the executors when taxed and ascertained. I further order and direct that the order of the 26th July, 1898, be rescinded, and that the assignees shall bear their own costs of the motion to rescind same.

J. MAC M.

(1) 1 Giff. 91.

(2) 19 Ves. 208.

Appeal. 1899. *In re* BALL. Jan. 24–26. Feb. 17.

The executors appealed to the Court of Appeal (Lord Ashbourne, C., Fitz Gibbon, Walker, and Holmes, L.JJ.).

Ronan, Q.C., and *Morphy*, for the appellants:—

The judgment appealed from fails to give due regard to the exception engrafted by judicial decision on the extremely general language of the Bankruptcy Acts. No doubt there are slight differences in the language of the English and Irish Acts in the sections which deal with the vesting of the bankrupt's property in his assignees; but for the purposes of this appeal the provisions of the Bankruptcy Code from time to time in force in England and Ireland with reference to vesting may be taken as identical. Not only are the English decisions applicable in Ireland, but though the Acts now in force in England are of modern date the decisions of the Courts on Acts now repealed apply to the existing enactments.

The cases all decide that, notwithstanding the generality of the language of the Legislature in the case of property acquired by the bankrupt after adjudication and before certificate, the bankrupt can deal with and give a good discharge for the same, unless the assignees have intervened and claimed the property. In *Fowler* v. *Down* (1) it was laid down that the bankrupt has a right to such property against everybody but the assignees, and that it is not competent to a stranger to dispute his title. Again, in *Kitchen* v. *Bartsch* (2), the principle was recognised that, where the assignees do not interfere, one who has contracted with the bankrupt after his bankruptcy shall not protect himself on their account against the claim of the bankrupt. The difference between a bankrupt's after-acquired property and his other assets is also stated in *Webb* v. *Fox* (3) and *Drayton* v. *Dale* (4). In the former case it was held that an uncertificated bankrupt has a right to goods acquired by him since his bankruptcy against all the world but his assignees, and may maintain trover for them against a stranger; in the latter case it was held, with regard to a promissory note made payable to a man who was a bankrupt, or his order, that the indorsee could

(1) 1 B. & P. 44.
(2) 7 East. 53.
(3) 7 T. R. 391.
(4) 2 B. & C. 293.

recover from the maker as the assignees had not claimed the payment to be made to them: the assignees (said Abbott, C.J.), have vested in them a right to interfere and claim after-acquired property; and if they do make any claim, it is effectual against the bankrupt and all the world; but if they do not interfere, then, as between the bankrupt (or one claiming under him) and his debtor, the latter cannot set up their title; but the bankrupt has a right in a court of law to enforce payment of his debt.

All these cases were decided on the English statute 1 Jac. 1, c. 15, s. 13, which was re-enacted almost *verbatim* by sect. 63 of 6 Geo. 4, c. 16. On this 63rd section of 6 Geo. 4, c. 16, the leading case on this branch of bankruptcy law, *Herbert* v. *Sayer* (1), was decided. That case was argued on demurrer, and it was there laid down, and has ever since been treated as law, that an uncertificated bankrupt may acquire property, and may contract, and may sue in respect of such property or contract, and that a plea alleging the bankruptcy constitutes no defence, unless there be an allegation that the assignees have interfered: Bullen and Leake, Pleading, 1868 edit., p. 508.

In the year 1849 was passed the Bankruptcy Law Consolidation Act (12 & 13 Vict. c. 106), and its 141st section provides for the vesting of the bankrupt's personal estate in the assignees. The language of this section cannot on this question be distinguished from that of the 267th section of the Irish Act (20 & 21 Vict. c. 60). It has been said that the principle of *Herbert* v. *Sayer* (1) does not apply to the present state of the Bankruptcy Code, but the case of *Morgan* v. *Knight* (2) disposes of that contention. In that case the plaintiffs were assignees in bankruptcy of Knight, who, at the time of the adjudication under which the plaintiffs were appointed, was already an uncertificated bankrupt. The plaintiffs sued the defendant in trover for goods which Knight had acquired after his first bankruptcy, and which he had fraudulently assigned to his son, the defendant. The assignees under the first bankruptcy did not intervene; the Court held that the second bankruptcy was not void, that the title of the bankrupt to the property after-acquired, which was good against every one

(1) 5 Q. B. 965. (2) 33 L. J., C. P. 168; 15 C. B. (N. S.) 669.

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except the assignees under the first bankruptcy, was transferred to the assignees under the second, and that the first assignees not having interfered, the second assignees were entitled to maintain this action. Erle, C. J., says:—"It is clear that an uncertificated bankrupt may acquire property. This appears from the law which transfers his after-acquired property to his assignees. This law assumes he may acquire property; otherwise there could be none to be transferred, and the result of the cases is not only that he may acquire property, but that he may hold it against all the world, except his assignees, and may create rights to hold it against them, if they, expressly or impliedly, consent to such property being in his order and disposition at the time of a subsequent bankruptcy." This case, which was approved in *Ex parte Watson* (1), expressly affirms the principle of *Herbert* v. *Sayer* (2), and applies it to the Act of 1849. The point has never yet arisen in any reported case in Ireland, but we ask the Court to apply the principle to the analogous 267th section of the Irish Act, which is still in force in this country.

Subsequent statutes have been passed in England, but the exception in the case of after-acquired property, originally created by "Judge made law," has not been touched. Thus it has been held, in *Ex parte Dewhurst* (3), that money received by an undischarged bankrupt and paid away for value, cannot be followed by the assignees, though the person to whom the money was paid had notice of the bankruptcy. The Court of Appeal, in *Jameson* v. *Brick & Stone Company, Limited* (4), declared that the law which existed at the time of *Herbert* v. *Sayer* (2) was still existing. In *Buchan* v. *Hill* (5), it was held that an undischarged bankrupt could sue without his trustee on a partnership agreement made since his bankruptcy unless the trustee intervened. The last case and *Herbert* v. *Sayer* (2) were approved in *Cook* v. *Whellock* (6). The principle was put a little further by *Cohen* v. *Mitchell* (7), where it was held that if a bankrupt, who has not obtained his discharge, enters into transactions in respect of after-acquired

(1) 12 Ch. D. 380.
(2) 5 Q. B. 965.
(3) L. R. 7 Ch. App. 185.
(4) 4 Q. B. D. 208.
(5) W. N. 1888, p. 233.
(6) 24 Q. B. D. 658.
(7) 25 Q. B. D. 262.

property, then until the trustee intervenes, all such transactions with any person dealing with the bankrupt, *bona fide* and for value, *and whether with or without knowledge of the bankruptcy*, are valid against the trustee. The principle is stated in Smith's Mercantile Law, 8th Ed., p. 646, 647, cited with approval in *Kitson* v. *Hardwick* (1). No doubt it may be that real estate does not come within the principle of *Herbert* v. *Sayer* (2), as was suggested in *The New Land Corporation* v. *Gray* (3); though leaseholds do: *Clayton & Barclay's Contract* (4); and it has been held that the principle does not apply as between the trustees respectively of a first and second bankruptcy: *In re Clarke: Ex parte Beardmore* (5).

Quite recently it has been held that the principle for which we contend applies where the after-acquired property consists of a legacy and a share of a residue under a will, even where the trustee intervenes before the bequeathed property has reached the hands of a *bona fide* equitable assignee: *Hunt* v. *Fripp* (6).

[They also cited *Barr's Trusts* (7), and *Lloyd* v. *Banks* (8)].

Campbell, Q.C., and *Samuels, Q.C.*, for the respondents:—

Section 267 of the Irish Act contains a provision not found anywhere in the English Bankruptcy Code, viz. the power given to the assignees to recover the property or debts of the bankrupt by proceedings taken in their own names. The legacy bequeathed to the bankrupt, therefore, did not vest in the bankrupt or pass through the bankrupt, but vested at once in the assignees, who are empowered to sue for it in their own names. This section is in an Act which was passed after the decision in *Herbert* v. *Sayer* (2), and must be read as declaring that that decision is not law in Ireland. There are no negative words in the English Acts of 1869 and 1883; and the negative words in the 6 Geo. 4, c. 16, s. 63, were limited to debts. The negative clause in the Irish section is most general. The principle of *Herbert* v. *Sayer* (2), even if applicable to the Irish Bankruptcy Code, does not govern

(1) L. R. 7 C. P. at p. 479.
(2) 5 Q. B. 965.
(3) [1892] 2 Ch. 138.
(4) [1895] 2 Ch. 212.
(5) [1894] 2 Q. B. 393.
(6) [1898] 1 Ch. 675.
(7) 4 K. & J. 219.
(8) L. R. 4 Eq. 222.

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the present appeal. In that case Tindal, C.J., based his judgment upon the fact that the bankrupt was to be treated as the agent of the assignees by reason of their not intervening but allowing the bankrupt to deal with the property. From their *laches* or acquiescence they were presumed to have given an authority to the bankrupt which they were estopped from denying. There can be no *laches* or acquiescence on the part of the assignees, or presumed authority for the bankrupt to give a receipt, where the assignees, did not know that the legacy had been left him.

The basis of all the cases relied on by the appellants is that the assignees in those cases knew what was being done by the bankrupt, and did not intervene to stop it. The bankrupt in every one of those cases had been with the knowledge, express or implied, of the assignees carrying on some trade or business, and thereby either acquired a special property in the goods in question: *Fowler* v. *Down* (1); *Webb* v. *Fox* (2); or earned money by his personal skill: *Jameson* v. *Brick and Stone Co.* (3); *Ex parte Watson* (4); *Hunt* v. *Fripp* (5); or the assignees were treated as having constituted him their agent: *Herbert* v. *Sayer* (6); *Cohen* v. *Mitchell* (7); or having consented to the property being in his order and disposition: *Morgan* v. *Knight* (8); or as being estopped from claiming the property: *Drayton* v. *Dale* (9).

There is a great difference between cases of that kind where the property claimed was *actively acquired* by the bankrupt by his trade, skill, or industry, carried on with the consent, express or implied, of the assignees, and the case of a legacy devolving on him without the knowledge of the assignees.

Ex parte Ford (10), *Meggy* v. *Imperial Discount Co.* (11), and *In re Clarke*: *Ex parte Beardmore* (12), all show that in order to deprive the assignees of their right to this legacy, they must be proved to have had notice, and to have stood by, so as to allow the bankrupt to deal with the legacy. The judgments in *Re Clarke*: *Ex parte*

(1) 1 B. & P. 44.
(2) 7 T. R. 391.
(3) 4 Q. B. D. 208.
(4) 12 Ch. D. 380.
(5) [1898] 1 Ch. 675.
(6) 5 Q. B. 965.
(7) 25 Q. B. D. 262.
(8) 33 L. J., C. P. 168.
(9) 2 B. & C. 293.
(10) 1 Ch. D. 521.
(11) 3 Q. B. D. 711.
(12) [1894] 2 Q. B. 393.

Beardmore (1) expressly state that *Ex parte Ford* (2) is the general case, and that *Cohen* v. *Mitchell* (3) is the exception.

In re Coombe (4) was approved in *In re Bright's Settlement* (5), and forms an express authority that property devolving on a bankrupt after bankruptcy, belongs to the assignees, and cannot be assigned by the bankrupt to a stranger, though without notice and for value. The hardship of making the appellants pay the legacy twice over does not affect the rights of the assignees: *M'Entire* v. *Potter* (6), decided on this very section, and *Ex parte Rabbige*: *In re Pooley* (7).

The argument of the appellants, if sound, would render the payment made to the bankrupt valid, even though the executors had notice of the bankruptcy.

Ronan, Q.C., in reply:—

There is nothing to shake the authority of *Herbert* v. *Sayer* (8), and the rules laid down in *Cohen* v. *Mitchell* (3). The principle on which those cases were decided shows that the property is not to be treated as vesting in the assignees until they intervene. The clause which says they may sue for the property in their own name contemplates their active intervention. In both *Herbert* v. *Sayer* (8) and *Hunt* v. *Fripp* (9), the parties who established their claim against the assignees had notice of the bankruptcy; the appellants had admittedly no notice.

Herbert v. *Sayer* (8) is not cited in *Ex parte Ford* (2).

In re Coombe (4) and *In re Bright's Settlement* (5) were not cases of after-acquired property: they were cases of reversionary property to which the bankrupt was entitled at adjudication, but which subsequently fell into possession.

[He also cited *Palmer* v. *Locke* (10).]

(1) [1894] 2 Q. B. 393.
(2) 1 Ch. D. 521.
(3) 25 Q. B. D. 262.
(4) 1 Giff. 91.
(5) 13 Ch. D. 413.
(6) 22 Q. B. D. 438.
(7) 8 Ch. D. 367.
(8) 5 Q. B. 965.
(9) [1898] 1 Ch. 675.
(10) 18 Ch. D. 381.

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LORD ASHBOURNE, C. :—

This is an appeal from Mr. Justice Boyd sitting in Bankruptcy, and raises an important question of Bankruptcy law.

In 1888 Edward Ball was adjudicated a bankrupt. His debts were returned as considerable, and his assets as trivial. He soon after left Ireland and did not pass his final examination or obtain his certificate.

On the 4th February, 1896, an aunt died, having by her will bequeathed to him legacies amounting to £1200. The will was proved on the 13th April, 1896, by her executors.

The executors made certain payments on account of the bankrupt, and paid him £1053 17*s.*, the balance of his legacies, on the 18th May, 1896. The executors had at the time no notice of the bankruptcy.

On the 2nd April, 1898, the assignees first became aware of the legacies, and after some variation of intention and some uncertainty of opinion, they at last made up their minds that they would seek for repayment of the legacies for the benefit of the creditors.

They accordingly applied to Mr. Justice Boyd "for an order that the executors do bring into Court the amount of such legacies."

The claim of the assignees was entirely based on the words of section 267 of the Irish Bankruptcy Act of 1857, which is as follows:—"When any person shall be adjudicated a bankrupt . . . all the personal estate and effects of such bankrupt, . . . present and future, wheresoever the same may be, and all property which he may purchase, or which may revert, descend, be devised or bequeathed, or come to him before such bankrupt shall have obtained his certificate, . . . and all debts due or to be due to him shall become absolutely vested in the assignees for the time being, for the benefit of the creditors of the bankrupt, . . . and no such bankrupt . . . and no person claiming through or under him shall have power to recover the same, nor to make any release or discharge thereof, neither shall the same be attached as the debt of such bankrupt . . . by any person according to the custom of the city of Dublin or otherwise, but such assignees shall have absolute power and remedy to recover the same in their own name."

Mr. Justice Boyd, after argument, arrived at the conclusion

that the words of the section were so explicit that he was bound to yield to the application of the assignees. It is impossible not to recognise that the words are very clear and absolute, and that unless there is a strong current of authoritative decision engrafting some qualification or distinction upon them they should be given their ordinary meaning as contended by the assignees.

Accordingly Mr. Ronan, for the appellants, practically threw over the words of the section, and said that a series of bankruptcy decisions of the highest authority had for a vast number of years taken a clear distinction between property of the bankrupt vested in him at the date of adjudication and that to which he might subsequently become entitled before his certificate.

Strange to say then there are no Irish decisions on the subject; but the matter has frequently come before the English Courts, whose decisions, entitled to the highest respect, have been discussed before us.

The question may be stated very shortly: could the bankrupt, being uncertificated, give a valid receipt for a legacy to which he became entitled after his adjudication, and before his assignees intervened; or have his assignees a right to disregard his receipt and compel the executors, who in good faith paid the bankrupt, to pay them over again the amount of the legacy?

The English statutes are not the same as the Irish, but they are substantially on the same lines, and manifestly intended to work out the same results. The English authorities are, therefore, very much in point, and must be considered by us with the highest respect.

They certainly lay down with great clearness that there is a broad distinction to be drawn in the case of uncertificated bankrupts between their present and future property, what they had at the time of adjudication, and what they became entitled to subsequently.

Mr. Ronan has placed in the forefront of his argument (though he cited many earlier authorities) the case of *Herbert* v. *Sayer* (1) as the leading authority to establish this cardinal point, on the application of which depends the whole appeal. The facts of that

(1) 5 Q. B. 965.

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case were much stronger than those now before us, and the case was decided on demurrer. The plaintiff there was an uncertificated bankrupt, and sued on a bill of exchange endorsed to him after the bankruptcy. The plea relied on the section of 6 Geo. 4, c. 16, on which section 267 of our Act is founded, and the Court of Exchequer Chamber reversing the Queen's Bench, held the plea to be bad, Tindal C. J., pointing out that the construction of the statute which he adopted "was most consistent with convenience, for otherwise there would be no protection to persons dealing with an uncertificated bankrupt. Not only would they acquire no title by purchases from him, but payments for such purchases and all other debts due to the uncertificated bankrupt would be invalidated." The result of the judgment was clearly to take the distinction between the present and future property of an uncertificated bankrupt and to treat his acts as valid in the absence of any interference or intervention by the assignees.

Many of the English cases turn upon contests between two bankruptcies, the rights of creditors under the first bankruptcy of the bankrupt as against the claims of creditors under his second bankruptcy. At first there was a contest as to the validity of a second bankruptcy, but that was settled by the case of *Morgan* v. *Knight* (1) (decided in 1864), the head note of which is as follows: —"The plaintiffs were assignees in bankruptcy of Knight, who at the time of the adjudication under which the plaintiffs were appointed, was already an uncertificated bankrupt. The plaintiffs sued the defendants in trover for goods, which Knight had acquired after his first bankruptcy, and which he had fraudulently assigned to the defendant. The assignees under the first bankruptcy did not in any manner interfere:—Held, that the second bankruptcy was not void; that the title of the bankrupt to the property after acquired, which was good against anyone except the assignees under the first bankruptcy, was transferred to the assignees under the second bankruptcy, and that the first assignees not having interfered, the second assignees were entitled to maintain the action."

Erle, C.J., in giving judgment, said:—"It is clear that an

(1) 33 L. J., C. P. 168.

uncertificated bankrupt may acquire property. This appears from the law which transfers his after-acquired property to his assignees. This law assumes he may acquire property, otherwise there would be none to be transferred, and the result of the cases is not only that he may acquire property, but that he may hold it against all the world, except his assignees, and may create rights to hold it against them, if they expressly or impliedly consent to such property being in his order and disposition at the time of a subsequent bankruptcy." Subsequently he adds:—"In *Herbert* v. *Sayer* (1) the plaintiff sued as the holder of a bill. The defendant pleaded that the plaintiff had been twice bankrupt, and had not paid 15*s.* in the pound. The Exchequer Chamber held the plea bad. The judgment is full of learning and sound reasoning, and decides that an uncertificated bankrupt has a right to acquire property and to hold it against all the world, except his assignees, and that if they choose not to interfere he is absolute owner."

The case of *Cohen* v. *Mitchell* (2), decided by the Court of Appeal in 1890, follows and develops this reasoning. Its head note is as follows:—"When a bankrupt who has not obtained his discharge enters into transactions in respect of property acquired after the bankruptcy, then until the trustee intervenes all such transactions with any person dealing with the bankrupt *bona fide* and for value, and whether with or without knowledge of the bankruptcy, are valid against the trustees."

Lord Esher, in giving judgment, read the proposition agreed upon by the Court of Appeal:—"Until the trustee intervenes all the transactions of a bankrupt after his bankruptcy with any person dealing with him *bona fide* and for value in respect of his after-acquired property, whether with or without knowledge of the bankruptcy, are valid against the trustee." Fry, L.J., in expressing his concurrence, having first pointed out the difficulty he would feel, "if he merely confined his attention to the words of the section," said, "I am quite aware that the rule has not been formulated in these terms yet, but it appears to me to be the true result of the earlier authorities, and in fact follows from the

(1) 5 Q. B. 965. (2) 25 Q. B. D. 262.

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distinction between the two modes of vesting, and therefore I do not see how we can stop short from drawing the conclusion."

The learned counsel for the respondents placed much of their reliance on the cases of *Ex parte Ford* (1) and *In re Clarke* (2)—both cases where there were two bankruptcies, and whose circumstances were, no doubt, such as to warrant the decisions arrived at, but are quite distinguishable from those of the present case. It is worthy of note that in the former the case of *Herbert* v. *Sayer* (3) was not cited. In the latter the learned Judges practically followed *Ex parte Ford* (1), and rested their decision upon its authority. Lord Esher said that *Ex parte Ford* (1) was the ordinary case and *Cohen* v. *Mitchell* (4) the exceptional one. A. L. Smith, L.J., dwelt upon the fact that it was a contest between the first and second trustee; and Davey, L.J., expressed the opinion that *Herbert* v. *Sayer* (3) did not apply to the case of two bankruptcies.

The learned counsel for the respondents were obliged, however, to admit that the binding authority of *Herbert* v. *Sayer* (3) had never in any case been canvassed or denied.

Mr. Ronan laid down two propositions in his argument:—First, that in no case from 1797 to the present time had it been held that the assignees have any right to follow after-acquired property of the bankrupt, which had reached his hands from other persons before the assignees have intervened; and second, where a bankrupt sues for a *chose in action*, his title to which has accrued after bankruptcy and before his certificate, it has never been held that a plea alleging bankruptcy and that the defendant had notice thereof was good, while it has always been held that to be good the plea should allege that the assignees had intervened.

No authority was cited on behalf of the respondents during the argument at all opposed to Mr. Ronan's challenge.

In my opinion the meaning and direction of the authorities goes to establish that protection should be given to third parties honestly and *bona fide* dealing with a bankrupt before the assignees intervene.

If the case rested alone upon the words of the statute without

(1) 1 Ch. D. 521.
(2) [1894] 2 Q. B. 393.
(3) 5 Q. B. 965.
(4) 25 Q. B. D. 262.

the light of the authorities which have been cited, I should have found it difficult to dissent from the conclusion of Mr. Justice Boyd, but for the reasons I have given I think that the appeal should be allowed with costs.

FITZ GIBBON, L. J. :—

I have been permitted to read the judgment of Holmes, L.J., and I beg to express my full concurrence in it. I shall only add a statement of what appear to me to be the foundation and the extent of our conclusion.

It is the inevitable consequence of an unbroken series of decisions, covering 165 years, that the vesting of "after-acquired" property in the assignees of a bankrupt, under a statute such as is now in force in Ireland (Bankruptcy Ireland Act, 1857, sect. 267), is not immediate or unconditional. Such property remains—is arrested as it were—in the bankrupt, until his assignees "intervene," *i.e.* do some act to assert their title to it. Their intervention is a condition precedent to its vesting in them. The property, from the moment of its acquisition up to the moment of the assignees intervention, remains at the disposal of the bankrupt, as if he was not a bankrupt, as against everyone except his assignees.

This principle extends to *choses in action*, and to the power of reducing them into possession. Whatever can be recovered by action must be lawfully receivable by the voluntary action of any person who could be compelled to transfer it. The power of enforcement and the right of voluntary tradition must be co-extensive, and each alike must involve the right of the one party to demand, and the power of the other party to give, a good receipt and a valid discharge.

It may have been, at first, a judicial *tour de force* which gave different effects to the language of the vesting clauses of the Bankruptcy Acts in the case of present and of after-acquired property, but the distinction has prevailed throughout Bankruptcy law from the beginning.

I find it judicially stated in 1734, under the Act 5 Geo. 2, c. 30, in *Ashley* v. *Kell* (1), in the following terms—"Though the

(1) 2 Stra. 1207.

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future effects of a bankrupt against whom two Commissions had issued, were liable to be seized for the benefit of creditors; yet the bankrupt had, in the meantime, such a property in them as enabled him to *transact* and sell to a *bona fide* purchaser."

It is now only of scientific interest to discuss whether the bankrupt's power over after-acquired property ought to be referred to an agency for the assignees until intervention, or to a defeasible ownership in himself. The rule has been consistently maintained under successive statutes, beginning with 13 Eliz. c. 7, all *in pari materiâ*, but varying in their language, and it has been tested under the strictest systems of pleading, in a series of cases. After *Ashley* v. *Kell* (1) in 1734, I may mention the decisions of Lord Hardwicke in *Ex parte Proudfoot* (2) in 1743, of Lord Mansfield in *Chippendale* v. *Tomlinson* (3) in 1785, of Lord Kenyon, at Nisi Prius, in *Silk* v. *Osborne* (4), *Evans* v. *Brown* (5), and *La Roche* v. *Wakeman* (6), all in 1794; and of the King's Bench in *Webb* v. *Fox* (7) in 1797. Eyre, C.J. in the Common Pleas, in the same year in *Fowler* v. *Down* (8), said—"That the bankrupt has a right against everybody but the assignees is maintained by the authorities." The earlier cases were reviewed by Tindal, C.J., in *Herbert* v. *Sayer* (9) in 1844, and his judgment was quoted and enforced by Fry, L.J., in *Cohen* v. *Mitchell* (10) in 1890. The construction which protected "persons dealing with an uncertificated bankrupt" was put upon the ground of preventing "great confusion, inconvenience, and hardship"; and it was "treated as a well-known principle, in this branch of law, perfectly well established for a long series of years," now fifty-five years ago. Though the earlier English statutes might, perhaps, be distinguished from the Irish Act of 1857, there is no material difference upon the point now in question, between that Act and the English Acts beginning with 6 Geo. 4, c. 16.

When the Judges have firmly stood by this principle of construction, and have applied it to Statute after Statute, Parliament

(1) 2 Stra. 1207.
(2) 1 Atk. 253.
(3) Cook's Bankrupt Laws, 260.
(4) 1 Esp. 140.
(5) *Ib.* 170.
(6) Peake, 140.
(7) 7 T. R. 397.
(8) 1 B. & P. 44.
(9) 5 Q. B. 965.
(10) 25 Q. B. D. 269.

must be taken to have recognised the judicial construction of the Acts, however "strong," as being correct.

The authorities warrant a limitation of the protection to "dealings in good faith," but mere notice of the bankruptcy is not enough to defeat it, though payment after notice may, under certain circumstances, go to negative "good faith."

Questions may arise as to what action on the part of the assignees will amount to such "intervention" as will vest the property in them. But in this case there was absolute good faith on the part of the defendants, and there was a total absence of intervention on the part of the assignees, because there was blank ignorance on both sides.

I shall not anticipate the judgment of Holmes, L.J., who will deal with the modern cases, further than to apply to the decision now appealed from, the language used by Lord Ellenborough in *Kitchen* v. *Bartsch* (1), in 1805. "After so great a length of time, and such a mass of property conveyed in this manner, it would now be too much to say that all which has been done is erroneous, and to put a new construction upon the Act." He added—"Especially when the argument in support of the construction which has prevailed on the statute of Elizabeth, has acquired force from the wording of the statute 1 Jac. c. 15."

For these words, I may now substitute—"especially when the construction which protects honest members of the public in dealing with bankrupts, as to after-acquired property, has been uniformly put upon every Statute which has been passed upon the subject for more than three centuries."

WALKER, L. J. :—

The executors in this case paid the amount of the legacy to the bankrupt in good faith, not knowing of his bankruptcy. It was a legacy to which he became entitled after his bankruptcy, and was, therefore, after-acquired property within the meaning of the 267th section of our Act of 1857, which apparently contains words large enough to include such a subject.

The 267th section of our Act is not in any substantial respects

(1) 7 East, at p. 61.

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different from the English Acts of 6 Geo. 4, c. 16, and 1 & 2 Wm. 4, c. 56, and there has been long established by English decisions an exception on the effect of the code vesting after-acquired property in the assignees protecting dealings with a bankrupt who is allowed by the assignees to deal with after-acquired property—an exception, perhaps, derived from analogy to the transactions which are expressly protected when they occur before adjudication.

So far back at least as the year 1844 it was established in the case of *Herbert* v. *Sayer* (1) in the Exchequer Chamber, that as regards after-acquired property all the acts of a bankrupt are valid until the assignees intervene and disaffirm his acts. That was the case of debt on a bill of exchange sued for by the bankrupt, the indorsee, and the Act of 6 Geo. 4 was not in any substantial respect different from ours. The principle of the judgment of Chief Justice Tindal is that till the assignees intervene "his acts are all valid." This covers the case of a legacy accrued and claimed and received by him.

It is not very material to determine the precise nature of the property which the bankrupt acquires in after-acquired property if we know what are his powers of disposition when he is not interfered with, and *Morgan* v. *Knight* (2) following out *Herbert* v. *Sayer* (1) establishes that he has a right to acquire property and hold it against all the world but his assignees, and if they choose not to interfere he is absolute owner for all purposes of dealing with it.

There are observations used in recent cases beginning with *Cohen* v. *Mitchell* (3), which for some time created a difficulty in my mind, as they appear to limit the protection to a dealing *bona fide* and for value, but that is explained by the circumstances that these cases were dealing with the claims of a third person who dealt with the bankrupt *bona fide* and for value, and it was held that the title of such a person prevailed against the trustee, whether such third party had knowledge of the bankruptcy or not, as he had acquired by the dealing for value a protected right.

To take the case before us, if the assignees had, before payment,

(1) 5 Q. B. 965. (2) 15 C. B. (N. S.) 669. (3) 25 Q. B. D. 262.

apprised the executors of their rights and claimed the legacy, their rights would have been different from what they would have been if the bankrupt had assigned the legacy *bona fide* and for value to a third person. There the intervention would not have availed against the particular assignee for value, and so *Hunt* v. *Fripp* (1) decides.

Nothing in *Cohen* v. *Mitchell* (2), or *Re Clarke* (3) or *Hunt* v. *Fripp* (1) interferes with the decision in *Herbert* v. *Sayer* (4) which is recognised in them, and I think it lays down a rule which, to use the words of Chief Justice Tindal, avoids confusion and inconvenience and hardship, and exactly applies to the present case.

It is not necessary to express an opinion as to what the result would be if the executors paid the legacy knowing that Ball was a bankrupt.

I concur that the appeal should be allowed.

HOLMES, L.J.:—

Edward Ball was adjudicated a bankrupt in 1888, and has not yet obtained his certificate. Under the will of an aunt, who died in 1896, he became entitled to a legacy of £1200; and her executors, finding the assets ample, shortly afterwards paid it in full, partly to the legatee himself, and partly to persons in whose favour he had created charges on it after the death of the testatrix. The assignees in the bankruptcy having, in 1898, heard of the bequest, applied for payment to the executors; and on their being met with a refusal, they obtained from Mr. Justice Boyd the order under appeal, directing that it should be paid by the executors to them. The question is simple; and there are no equities on either side. At the time of payment the executors did not know, and had no reason to believe, that the legatee was a bankrupt; and the assignees, until shortly before they demanded payment from the executors, did not know, and had no reason to believe, that he was entitled to the legacy. The good faith that springs from ignorance exists in the case of both; and the net legal point is raised in the most elementary shape. Our bankruptcy law owes its origin to legislation; and one naturally turns

(1) [1898] 1 Ch. 675.
(2) 25 Q. B. D. 262.
(3) [1894] 3 Q. B. 393.
(4) 5 Q. B. 965.

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to a statute for assistance in solving its difficulties. Accordingly, we have been referred to the 267th section of 20 & 21 Vict. c. 60, the provision now in force, which has been already read by the Lord Chancellor.

This section seems precise and apposite. It would appear from it—1, that all the property, including legal and equitable *choses in action*, to which the bankrupt was entitled at the date of his adjudication, and all similar property to which he becomes entitled thereafter, and before he obtains his certificate, vest in the assignees in the same way; 2, that the bankrupt himself can neither recover nor give a discharge for property of either kind; and, 3, that the assignees alone are the persons who have legal authority to receive it. It has never been disputed that this is so in the case of property to which the bankrupt was entitled at the date of the bankruptcy. The payment subsequent thereto of a debt or legacy then vested in him is invalid; and the debtor or executor making it can be compelled to pay it a second time to the assignees, however complete his ignorance of the adjudication, and however excusable such ignorance may be. The case of *In the Trusts of the Will of Mary Coombe* (1), referred to and strongly relied on by Mr. Justice Boyd, was a case of this kind; and I am not aware that the proposition has ever been seriously questioned. But in the present case we are dealing with an equitable *chose in action*, which first vested in the bankrupt after adjudication.

It is somewhat singular that there is in Ireland no reported case on this subject, although in England there has been a series of authorities relating to it, extending over a period of one hundred and fifty years. The law of bankruptcy in the two countries ran on the same lines until comparatively recently; and in the branch of it to which I am now referring, I can find no substantial difference up to the present day. It is, therefore, impossible to decide this question on the language of the statute alone without reference to the English decisions, which from the earliest times have laid down that there is an essential difference between the right of assignees to property vested in the bankrupt at the time of adjudication, and their right to property which has come to him subsequently and before certificate. It would be a long and

(1) 1 Giff. 91.

unnecessary task to examine all these cases. I take one, not the first in time by a long way, but distinguished by its high authority and by the circumstance that the question, being raised at law on a demurrer to a plea, is presented with peculiar neatness and precision.

Herbert v. *Sayer* (1) was an action on a bill of exchange by an indorsee against the acceptor. The plea demurred to averred the facts necessary to show the bankruptcy of the plaintiff, and further facts of which the legal consequence was to place him in the same position as if he had not obtained a certificate. It then averred that, in this state of things, the bill of exchange was indorsed to the plaintiff, whereby, and by force of the statute in such case made and provided, the cause of action, and the sum of money claimed, were vested in the assignees. The statutory provision relied on was section 68 of 6 Geo. 4, c. 16, which, in so far as the question now at issue is concerned, cannot be distinguished from the 267th section of the Irish Act of 1857. It is to be observed that the bankrupt was himself the plaintiff, and therefore the considerations that might have arisen in the case of a person who had taken the note from him for valuable consideration and without notice were absent. The defendant, moreover, had notice of the bankruptcy; and it was not averred that the assignees had knowledge of the note. In this state of circumstances, judgment was given for the defendant on the plea in question by the Court of Queen's Bench; but on error being brought, this judgment was reversed by the Exchequer Chamber. Tindal, C.J., who was the spokesman of the Court, says: "The effect of the statutory enactments may be either to transfer immediately such property"—that is to say, all future property—"or contracts from the bankrupt to the assignees, vesting the property in the bankrupt for an instant only, or to give the assignees the beneficial interest, and to make the bankrupt acquire the property or contract for their benefit only, in the nature of an agent. The cases accord with the latter construction of the statute, and it is most consistent with convenience; for otherwise there would be no protection to persons dealing with an uncertificated bankrupt. Not only would they acquire no title by

(1) 5 Q. B. 965.

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purchases from him; but payments for such purchases, and all other debts due to the uncertificated bankrupt, would be invalidated. . . . The only way by which they can be rendered valid, and great confusion, inconvenience, and hardship prevented, is by adopting the latter construction, and holding that the bankrupt acquires property and contracts, for the assignees, who may, whenever they please, disaffirm his act, but until they do so, his acts are all valid." He concludes by holding that "the plea is bad for not stating, as was done in *Kitchen* v. *Bartsch* (1), that the assignees had interfered, and required the defendant to pay to them." Of course it follows even *a fortiori* that payment by the defendant before action would have been good; and it seems clear that without over-ruling this case, it is impossible to maintain the order appealed from. *Herbert* v. *Sayer* (2) was not only preceded by many cases to the same effect, but its authority has been recognised and followed to the present time; and the averment suggested by Tindal, C.J., as necessary to make the defence good, is to be found in all the precedents of pleading since published. I may refer to *Morgan* v. *Knight* (3) as being a case in which the principle acted on in *Herbert* v. *Sayer* (2) was not only affirmed but applied in different circumstances. There an uncertificated bankrupt was adjudicated a bankrupt a second time; and the assignees in the *second* bankruptcy were held entitled to maintain an action against a third party for conversion of property acquired by the bankrupt after his first adjudication. The peculiarity of this case is that the title of the plaintiffs arose through the same statutory provision which seems to confer a prior title on the earlier assignees; and it is doubtful whether this decision would now be followed unless it could be shown that the goods were "in the order and disposition of the bankrupt" as those terms are understood in the bankruptcy code.

Herbert v. *Sayer* (2) was considered very fully by the Court of Appeal in England in *Cohen* v. *Mitchell* (4). A bankrupt who had not obtained his discharge was engaged in buying and selling agricultural implements, some of which had been taken possession of by one Foale. The bankrupt brought an action for their

(1) 7 East, 53.
(2) 5 Q. B. 965.
(3) 33 L. J., C. P. 168.
(4) 25 Q. B. D. 262.

conversion, but not having the means to carry it on, he assigned the cause of action to Arthur Cohen, in consideration of existing debts and a further advance. Cohen obtained a verdict for £120, which was claimed by the assignees. Foale thereupon interpleaded, and paid the money into Court, and the Court of Appeal was called on to decide between the assignees and Cohen. If the bankrupt had himself gone on with the action and obtained judgment, the assignees would undoubtedly have been entitled to the money, for they could have interfered down to the last moment; and it was argued that Cohen was in no better position than his assignor. The authority of *Herbert* v *Sayer* (1) was accepted as the basis of the judgment of the Court, and its principle was extended so as to protect a transferee of the bankrupt for value against even his assignees in bankruptcy. Fry, L. J., says, "if one merely confined one's attention to the words of the section, the reader might suppose that both those kinds of property"—that is, property belonging to the bankrupt at the commencement of the bankruptcy, and property which may be acquired by, or devolve upon him before his discharge—"vested absolutely in the trustee—vested in him precisely in the same manner." Then after pointing out the inconveniences of such a construction, he proceeds, "The difficulty has been met by establishing a distinction, and it has been held that the property does not vest in the trustee so as to prevent the bankrupt from maintaining an action simply by reason of his bankruptcy, and that the person who sets up the bankruptcy as his defence to any action brought by the bankrupt in respect of after-acquired property, must not only allege the bankruptcy, but must allege that the trustee has intervened; and if he does not so allege, the defence is not good." The Lord Justice then refers to the passage in the judgment of *Herbert* v. *Sayer* (1), which I have already quoted; and he adopts it with a modification in one expression which is immaterial for the purposes of the present case. He concludes by saying, that it follows from the distinction between the two modes of vesting, that dispositions of personal or other property made by a bankrupt to a person who receives it in

(1) 5 Q. B. 965.

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good faith and for value must be valid, and therefore he holds that Cohen, the transferee of the cause of action, was entitled to the fruits of the verdict as against the assignees. It would not be possible to find a more emphatic affirmance of the propositions laid down in *Herbert* v. *Sayer* (1). The present case has been argued on behalf of the assignees, almost entirely on the authority of two cases. It has not been disputed that there is no material distinction between the language of the sections under which the English decisions have been given, and the 267th section of the Irish Act of 1857. It has not been denied that the executors when they paid the legacy were in at least as good a position as the acceptor of the bill of exchange, who in *Herbert* v. *Sayer* (1), unsuccessfully declined to pay the amount of it to the uncertificated bankrupt. But reliance is placed on *Ex parte Ford* (2), and *In re Clarke* (3), as qualifying, if not explaining away, the judgment in *Herbert* v. *Sayer* (1).

Ex parte Ford (2) was a case in which a trader who had filed a liquidation petition, and who, after his estate had been realised by the trustee, but before he had received his discharge, went into business again. Sometime later he filed a second liquidation petition; and a trustee was appointed who sold the debtor's estate to the debtor himself for a price which was paid into Court. The trustee in the first liquidation claimed this money for the creditors in that matter; and it was held that he was entitled to it. This case was not unlike *Morgan* v. *Knight* (4) in the circumstance that there were two bankruptcies; but it differed therefrom, in that the contest was not between the second trustee and a wrong doer who had taken possession of some of the bankrupt's property, but between the two trustees, each claiming a fund under the control of the Court. Neither *Herbert* v. *Sayer* (1) nor *Morgan* v. *Knight* (4) was referred to, nor would either have been in point. The Court having held that the goods were not in the order and disposition of the trader, as understood by the law of bankruptcy, and that the first trustee had not consented to his engaging again in business, it followed that the right to intervene had not been lost.

(1) 5 Q. B. 965.
(2) 1 Ch. D. 521.
(3) [1894] 2 Q. B. 393.
(4) 33 L. J., C. P. 168.

The question in *In re Clarke* (1) arose under similar circumstances. There the undischarged debtor assigned his property to a trustee for the benefit of his creditors, who in consideration of the assignment released him from the debts. He was afterwards adjudged bankrupt a second time, the act of bankruptcy being the aforesaid assignment. The official receiver, having realised the assets, applied to the Court for direction as to their distribution; and the contest arose between the creditors in the two bankruptcies. *Ex parte Ford* (2) was, therefore, precisely in point unless it could have been distinguished by reason of the assignment. It was argued that the trustee, on behalf of the creditors, stood in the same position as the transferee of the cause of action in *Cohen* v. *Mitchell* (3); that is to say, was an assignee for value and without notice. The Court held that he was not, and that the principle acted on in *Ex parte Ford* (2) applied. At the same time it recognised, without qualification, the authority of both *Cohen* v. *Mitchell* (3) and *Herbert* v. *Sayer* (4).

The propositions therein laid down are too well established to be disregarded by this Court, or I should think by any Court. They have long ago become part of the law, and since they became so, statute after statute has been passed, containing practically the same language which forms the foundations of these propositions. It must, I think, be assumed that the Legislature, by repeating the language, has recognised the construction that has been placed on it. Having regard to such construction, the order appealed from cannot be supported; and the application of the assignees for payment of the legacy by the executors must be refused.

Solicitors for the assignees: *Bennett Thompson & M'Laughlin.*
Solicitors for the executors: *Carruthers & Gamble.*

G. Y. D.

(1) [1894] 2 Q. B. 393.
(2) 1 Ch. D. 521.
(3) 25 Q. B. D. 262.
(4) 5 Q. B. 965.

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1899.
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CONNOLLY *v.* LEAHY (1).

(1898. No. 7949.)

Will—Construction—Gift over subject to money payment—Statute of Limitations—3 & 4 Wm. 4, c. 27, ss. 3, 4—Accrual of right of action—Ejectment—Costs—Judicature (Ireland) Act, 1877, s. 53.

A testator, who died in 1863, devised freeholds to his wife B. and his daughter J., to hold jointly during B.'s life, and after B.'s death to J. in fee, "provided always, that if my said wife (B.) should ever get married, she shall forfeit and lose all claim and title to any of my property on receiving the sum of £50." Testator's widow B. was married again in 1874. J. came of age in 1879, and died intestate and unmarried in 1897. It 1898 the plaintiff (the heir-at-law both of J. and of the testator) tendered £50 to B., and demanded possession of the land: and on B.'s refusal brought an action of ejectment against her and her husband. The action was tried before a Judge and jury, and, it not being suggested that there was any question of fact proper to be left to the jury, the Judge directed a verdict for the defendants, on the ground that the election to take advantage of the forfeiture should have been exercised within a reasonable time. On new trial motion:—

Held, that the right of action only accrued in 1898, upon the tender of the £50, and that (on lodging this amount in Court) the plaintiff was entitled to recover possession of the lands.

Held, further (*diss.* O'Brien, J.), that, inasmuch as the action was in substance an action to determine a question of difficulty on the construction of the will of a person through whom both parties claimed, which raised the substantial question in the case—a question for the Judge at the trial, both sides admitting that there was no question for the jury—both parties should abide their own costs of the trial and argument.

New Trial Motion of an action of ejectment on the title, tried before Mr. Justice Gibson and a common jury of the city of Dublin in Michaelmas Sittings, 1898. The question in controversy depended upon the construction and effect of a forfeiture clause in the will of James Connolly deceased, dated the 14th November, 1862, in these terms:—"I will demise and

(1) Before Sir Peter O'Brien, L.C.J., and O'Brien and Andrews, JJ.

bequeath all my property real and personal unto my beloved wife Bridget Connolly and to my daughter Jane Connolly to have and to hold the same jointly during the life of my said wife and after her death to my said daughter her heirs and executors for ever: Provided always that if my said wife should ever get married she shall forfeit and lose all claim and title to any of my property on receiving the sum of £50; and I hereby appoint my said wife Bridget Connolly the executrix of this my last will."

The testator, who died on the 2nd February, 1863, was owner of a small fee-simple. His widow, Bridget, married the defendant, M. Leahy, in November, 1874. His daughter, Jane Connolly, who was born about the year 1859, died intestate and a spinster, on the 7th May, 1897. The plaintiff, John Connolly, a nephew and the heir-at-law of the testator James Connolly, and also the heir-at-law of Jane Connolly, tendered, in May, 1898, to the widow the sum of £50; and, on her refusal to accept same and give up possession, brought an action of ejectment against her and her second husband, M. Leahy.

At the close of the plaintiff's case, counsel for the defendants asked for a direction on the ground that there was no gift over, and therefore no effective forfeiture, that the cause of forfeiture accrued in 1874, and that the tender which was necessary to make it operative was too late.

The learned Judge reported:—"No question of fact was suggested as proper to be left to the jury. I was disposed to think that, on the frame of the forfeiture clause, the election to take advantage of the forfeiture must be exercised within a reasonable time, and could not be held in suspense. I directed a verdict for defendants and extended time for moving, with stay of execution."

The Registrar's certificate stated that "by direction of the Judge the jury found for the defendants, and the Judge gave judgment" for them with costs.

Counsel for the plaintiff now moved for an order that the verdict and judgment directed to be entered by Mr. Justice Gibson at the trial in favour of defendants be set aside, and that judgment be entered for the plaintiff for the possession of the lands in the statement of claim claimed, together with the costs

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of the action and the costs of this application, or for a new trial, upon the ground of misdirection and non-direction.

Denis Henry, Q.C., and *D. Kehoe*, for the plaintiff:—

The effect of the testator's will was to make his widow and his daughter Jane joint tenants of the freehold until the widow's death or second marriage, the daughter becoming entitled upon the death or second marriage of the widow to the entire freehold, but in the latter event only upon payment to testator's widow of the sum mentioned, £50. The widow might have married after Jane's death, and the right to the benefit of the gift over on payment of the £50 cannot have been intended to be confined to the daughter. Upon the widow's second marriage, the daughter Jane, if aware of the condition of the gift over, or, after her death, the plaintiff, as her heir, was entitled to enforce the gift over, but only on tender of the £50. The forfeiture, therefore, only accrued in 1898 upon tender of the amount, and the Statute of Limitations affords no defence. There is no evidence that Jane Connolly had notice of the condition of the gift over, and time would not, in any event, commence to run until she had received such notice: *Doe* v. *Beauclerk* (1).

James H. Campbell, Q.C., and *J. P. Brett*, for the defendants:—

The right of action accrued to Jane Connolly in 1874, upon the defendant's second marriage, and the statute is a bar to the plaintiff's claim. There is no finding that the daughter was or was not aware of the condition of the gift over; but, living as she did in the house with the defendants, her mother and stepfather, until her death in 1897, the only reasonable inference is that she must have known of the condition in the will, and that, after she had arrived of age, she acquiesced in treating, and elected to treat, the forfeiture as a nullity. Even if the right to enforce the gift over (if valid) was not personal to the daughter, and would pass to her heir or devisee, still it was open to her to abandon that right, and an election to enforce it should be made within a reasonable time.

(1) 11 East, 657.

[Reference was made during the argument to the following authorities:—*Newton* v. *Marsden* (1); *Harvey* v. *Aston* (2); *Williams* v. *Pott* (3); *Astley* v. *Earl of Essex* (4); *Brown* v. *Cutter* (5); *Elwin* v. *Elwin* (6); *Clarke* v. *Clarke* (7); *Tennent* v. *Neil* (8); *Pickard* v. *Sears* (9).]

Cur. adv. vult.

Feb. 9.

SIR P. O'BRIEN, L.C.J.:—

This case presents for our determination the question of the construction of a short passage in a short will, the will of a man James Connolly, who appears to have been a farmer resident in the county of Kildare. Connolly was owner of a small fee-simple estate called Woodlee. He made his will on the 14th November, 1862, and died on the 2nd February, 1863, leaving him surviving his widow, Bridget, and a daughter called Jane. His widow, Bridget, who is one of the defendants, married the other defendant, Leahy, in November, 1874; Connolly's daughter, Jane, died unmarried in the year 1897. The passage in the testator's will is as follows:—"I will and bequeath all my property real and personal unto my beloved wife Bridget Connolly and to my daughter Jane to have and to hold the same jointly during the life of my said wife and after her death to my said daughter her heirs and executors for ever: Provided always that if my said wife should ever get married she shall forfeit and lose all claim and title to any of my property on receiving the sum of fifty pounds."

The question we have to determine turns upon the true construction, in the events which have happened, of this proviso. The widow married again in 1874; and Jane, the testator's daughter, never sought in her lifetime to take advantage of the forfeiture clause; but the plaintiff, who is her and her father's heir-at-law, after Jane's death, tendered to the widow the sum of £50. The widow having refused to take it, the question arises, Is the plaintiff, as heir-at-law, entitled to take advantage of the forfeiture clause? In our judgment he is so entitled, and is accordingly

(1) 2 J. & H. 356.
(2) 1 Atk. 361.
(3) L. R. 12 Eq. 145.
(4) L. R. 18 Eq. 290; 30 L. T. 485.
(5) Raym. 427.
(6) 8 Ves. 546.
(7) Ir. R. 2 C. L. 395.
(8) Ir. R. 5 C. L. 416.
(9) 6 A. & E. 469.

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entitled to recover possession of the lands of Woodlee, the subject-matter of the ejectment.

No cases reported in the books throw any light on the subject. Counsel at both sides say they can find none; and, indeed, cases decided upon the construction of the will of one man afford generally little or no aid as to the true construction of the will of another man. We must collect the intention from the language used, having regard to the whole scope of the entire will. I have given the language of the will; let me recur to the proviso. It runs thus:—"Provided always that if my said wife should ever get married she shall forfeit and lose all claim and title to any of my property on receiving the sum of £50." What was the meaning of this? That the widow was not to be left derelict, as regards means, if she married again. That she was to have the land until she got the £50, but that then all connection with the land was to be severed. Mr. Campbell and Mr. Brett contend that the proviso was to be read in this way, "Provided she marries again and then gets a sum of £50, she is to go," and that, as she did not get the money when she married, the forfeiture clause could not take effect. This, however, is not the language of the will. The words of the will are, "on receiving £50"; there is no limitation as regards time or person. As regards person, of course I do not refer to a person who is a mere stranger to and has no privity with the estate. It could not be reasonably argued that the daughter was the only person who could take advantage of the clause, or that the right to take advantage of it was personal to her. The words are, if my wife should "*ever*" marry. The widow might have married after the decease of the daughter; and, if the daughter died leaving a son, it could not with any show of reason be contended that he could not insist on the forfeiture. As the heir of the daughter he could have insisted on the forfeiture; and, if the son, *qua* heir, could do so, I see no reason in law, or upon the true construction of the will, why the plaintiff as heir-at-law cannot do so. It occurred to my brother Gibson that the condition should be exercised within a reasonable time, that is to say, that the payment or tender of the £50 should have been made within a reasonable time. I can find no limitation of time in the words used. The contention put forward by the defendants' counsel that it should be exercised *eo instanti* with the

marriage is certainly not well-founded. It could never have been contemplated that the daughter, if under age, should have exercised it immediately. There is no limitation of time in the words, and we must stand by the words used. To import into the will a condition that the forfeiture clause, if it was to be availed of at all, should be availed of within a reasonable time, would be to add to the words of the will, which we cannot do.

Having regard to the view I have taken of the will, the Statute of Limitations does not in any way apply. As to acquiescence, there is no evidence that the daughter knew anything about the terms of the forfeiture clause. *Pickard* v. *Sears* (1) was cited by Mr. Brett. *Pickard* v. *Sears*(1) is an old friend—it was largely associated with the professional life of the late Mr. Macdonogh, who cited it in almost every case in which he was engaged at the bar; but it does not apply here. The doctrine upon which it rests was not glanced at at the trial, nor, indeed, does it appear that the daughter made any representation upon which the defendants acted or altered their position.

As to costs, I think we can make a special order that each party shall bear their own costs. There are, no doubt, cases which may end in a question of law and a direction, and in which it would not be right to make any special order; but this was an action in which it appeared, and in which it was admitted at the bar during the argument, that from the beginning there was no case for the jury. It was a mere question of construction for the judge from the beginning. I think that there were difficulties in the construction of this will; I own that my opinion wavered; and we differ from the view of my brother Gibson. Following, then, what should be done in a Court of Equity, we will make a special order that each party should abide their own costs.

O'BRIEN, J.:—

There is only one view, upon the construction of this will, on which, in the opinion I form, the defendants would have had any possible defence:—If the clause was open to the construction, which might have been in the mind of the testator himself, that it could

(1) 6 A. & E. 469.

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be taken to mean that, if his wife should marry again, she should lose all right to the property, but should then be entitled to a sum of £50, charged, it may be, upon the property. If that were the true construction, it would, perhaps, furnish a defence, for the statute in that case would have given her a title, since the period of limitation has now elapsed, and the circumstances do not admit of the application of any of the incidents of a joint tenancy. But it would be difficult to give that construction to the clause, for several reasons. Not only are the words different, but their effect is entirely different. On the other hand, if the other construction be right, that there was a gift for life, and (if the widow should marry) a gift to her of £50, this would be greatly to her disadvantage; for she could not retain the land as her security, but must give it up, so that the gift in this case resembles very much in its nature a "Welsh mortgage," where a person is put into possession of land until a debt due to him is satisfied.

I agree in the result stated by the Lord Chief Justice, but should be very glad if I could see my way out of that conclusion. The testator apparently thought that the interest of his infant daughter would be better secured by his wife remaining unmarried, and, with the aversion of people of his class to any stranger getting into possession of their holding, he may have inserted in his will this restriction; but he did not take sufficient notice of the circumstance that the widow could not cultivate the land herself without paying for labour, an expense which in this country would take away most, if not all, the profits of husbandry. In similar cases it is often to be seen that the widow marries a second time, not from choice, but simply in order to carry on the work of the farm for her children's sake. In the present case it seems a cruel thing to have allowed her to remain there for thirteen years, and it is apparent that it was in the interests of the infant child that she did remain on and that she married a second time. That does not, however, affect the question of law, or the conclusion that in the strict result there was a cesser of the estate upon a condition, of which there are many examples in our law—which can by no means be met by the argument that this was a clause *in terrorem*, because the authorities cited are all in regard to men. It is merely a change of the limitations of the land under the condi-

tion, and really a limitation although called a forfeiture. The intention was to give to the wife a sum of money—probably the amount she had brought with her on her marriage as her fortune. A great difficulty would, no doubt, have arisen if the daughter still continued to live, for the question would at once occur to anyone, whether the incidents of a joint tenancy could be applicable in favour of the daughter, when the other moiety was taken away by a condition of this kind. That question, however, does not arise in this case, and it is unnecessary to express an opinion upon it.

In regard to the costs, I am unable to agree with the Lord Chief Justice and Mr. Justice Andrews. It appears to me that, since the plaintiff has succeeded, he is entitled to his costs of action; and as it appears to me, it would disturb the fundamental rules of law in this country in regard to ejectment, if we were to apply to an action of ejectment the principles which govern Courts of Equity or the Court of Probate in dealing with the construction of a will. The Judge who tried this case gave the costs against the plaintiff; I consider that we are bound to give costs against the defendants; and I do not see how any rule could be propounded, in regard to a case such as this, which would not equally apply to almost every jury case in which any question of the construction of a will arose. It has been the practice, from which in my experience I have known no single instance of any departure, that, in all ejectments in which lands are recovered, the costs invariably follow the result. Almost all cases of ejectment involve questions of law, often turning upon the construction of a will, and the introduction of such a principle in regard to costs as is here proposed by the other members of the Court, seems to me to be totally contrary to the received and settled practice of the Court, even if such a power at all apply under the Judicature Act to any but personal actions.

ANDREWS, J.:—

[Having referred to the facts, continued:] Under the circumstances of this case, no question appears to me to arise under the Statute of Limitations, the right of the plaintiff having, in my opinion, only accrued in last May, when the tender of £50 was

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made and refused. I do not think that it was seriously contended that the right to tender the £50 was personal to Jane Connolly. The testator so framed the forfeiture clause that it could be made effective, in case his wife should "ever get married;" and, if her second marriage had taken place after her daughter Jane's death, it could not have been held that the provision for forfeiture had ceased to be capable of being made effective by Jane's grantee, devisee, or heir-at-law. It was not contended that the forfeiture clause could be held invalid as being *in terrorem*, and, as to acquiescence, there is no evidence to show that Jane had any knowledge of the provision in question in the will. Even if it could be assumed that she had such knowledge, there is no evidence to show that the widow was induced by any such acquiescence to alter her position, or incur the risk of sustaining any loss. Looking at the size of the farm and the circumstances of the testator's estate generally, and the widow's refusal to receive the £50 when tendered, the conclusion seems tolerably clear that it was more beneficial to her to remain on than to receive the £50 and give up possession; and I can see no ground for complaint on her part that she was permitted to continue in possession for so long. I agree that on the tender of the £50 the forfeiture accrued, and that the plaintiff was entitled to a direction in his favour accordingly.

As to the question of costs, upon which I regret that there should be a difference of opinion among the members of the Court, I only wish to say a few words in explanation of the grounds upon which I think that the parties to this action should, respectively, abide their own costs. The 53rd section of the Judicature Act, 1877, provides that, "subject to the provisions of this Act, and of Rules of Court, the costs of and incident to every proceeding in the High Court . . . shall be in the discretion of the Court, . . . provided that . . . the costs of every action, question, and issue tried by a jury shall follow the event, unless, upon application made, the Judge at the trial or the Court shall, for special cause shown and mentioned in the order, otherwise direct." Now, although it is true that this was an action of ejectment, and tried in the Queen's Bench Division, it was not, in my opinion, tried by a jury within the meaning of the 53rd section. The learned

Judge who tried it, has reported, and it was admitted both before him and on the argument in this Court, that the question in controversy depended altogether on the construction and effect of the forfeiture clause in the will of James Connolly, which is the foundation of the title on both sides. No question was sent to the jury; and the verdict was directed by the Judge, by whom alone the case was tried. The sole question in controversy was a question of admitted difficulty on the construction of the will, and the justice therefore of leaving the parties to abide their own costs seems to me to be apparent; and, had the very same question been brought for decision in the Chancery Division, no exception could, as it appears to me, have been taken to the justice or propriety of the order as to costs which is about to be made. I therefore see no valid ground for refraining from making it in this Court, and, as I have already intimated, the 53rd section of the Judicature Act, 1877, does not, in my opinion, preclude this Court from making it in the present case, in which the special circumstances appear to the Court to render the order a just and proper one.

THE COURT ordered accordingly:—

"THAT the verdict and judgment directed to be entered herein by the Right Hon. Mr. Justice Gibson at the trial . . . be, and the same are, hereby set aside; that the plaintiff do, within a week from the date of this order, lodge in Court to the credit of this action the sum of £50, . . . and that the said sum of £50 be thereupon paid out of Court to the defendant Bridget Leahy; that the verdict and judgment be entered for the plaintiff for possession of the lands and premises in the writ and statement of claim mentioned, as against the defendants Michael Leahy and Bridget Leahy; that execution on the said judgment for the plaintiff shall not issue until the said sum of £50 shall have been lodged in Court by the plaintiff as aforesaid; and, the majority of the Court being of opinion that the action was in substance an action to determine a question of difficulty on the construction of the will of James Connolly, deceased, through whom the parties respectively claim, and which raised the substantial question in the case, which was a question for the Judge at the trial, both sides admitting that there was no question for the jury: the Court (the Right Hon. Mr. Justice O'Brien dissenting) doth

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order that the parties respectively do abide their own costs of this action, including the costs of the argument of the said motion."

Solicitor for the plaintiff: *M. C. O'Meara.*
Solicitor for the defendant: *S. J. Brown.*

A. E. R. J.

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GIBSON *v.* RIDDELL (1).

Nov. 17. *Parliament — Franchise — Inhabitant householder — Occupation as tenant — Father of claimant dying intestate — Rent receipts given to claimant — Consent of other next-of-kin — Agreement — Joint or sole occupation.*

The tenant of a farm died intestate, leaving a son B. and two daughters his sole next-of-kin, who resided together on the farm which they worked, and were supported out of the produce. For two years B. obtained in his own name receipts for the rent of the farm. An agreement was given in evidence on behalf of B., dated the 13th July, 1896, by which, after reciting that he had been, with the consent of his sisters, accepted as tenant of the farm, his sisters agreed to abandon all claims they might have, or might have had, as next-of-kin of their father, or otherwise, on the farm :—

Held, that B. was in occupation of the premises as tenant, and entitled to the franchise.

APPEAL by Bernard Gibson from the decision of Mr. D. F. Browne, Revising Barrister for North Tyrone, striking the appellant's name off the list of voters for the said Division.

The facts, which appeared from the case stated, were as follows :—

At a Court held at Dunnamanagh on the 21st September, 1898, and the following days for the polling district of Dunnamanagh the name of Bernard Gibson appeared on the supplemental list as an inhabitant occupier of a dwelling-house situate at Binelly in the said polling district, and he was objected to by the said Thomas Riddell on the ground that he did not occupy the said premises as sole tenant or owner thereof.

It was proved on behalf of the said Thomas Riddell that James Gibson, father of the said Bernard Gibson, had up to the time of his death been tenant of the said dwelling-house and of a small farm

(1) Before SIR PETER O'BRIEN, L.C.J., and FITZ GIBBON, WALKER, and HOLMES, L.JJ.

held therewith. The said James Gibson died intestate about 1893, leaving his son Bernard Gibson, and two daughters, Unity Gibson, and Anne Gibson, his sole next-of-kin him surviving. In the year 1896 the said Bernard Gibson received from the landlord of the holding rent receipts in his own name for the rent payable in respect of the said holding.

Neither the said Unity Gibson nor Anne Gibson had received her distributive share of her father's assets.

Since the death of his father as aforesaid the said Bernard Gibson resided with his said sisters in the said dwelling-house, and he and his said sisters had since that time worked the said farm and supported themselves out of its produce.

On behalf of the said Bernard Gibson, Michael Devine, a political agent and inspector (whose evidence the Revising Barrister believed), deposed that on the 13th July, 1896, without any previous instructions from the said Bernard Gibson or from either of his said sisters, he called at the dwelling-house and there met the said Bernard Gibson and his said sisters; that he, the said Michael Devine, produced a document purporting to be an agreement betwween the said Bernard Gibson and his sisters in the following words:—

"Agreement made the 13th day of July, 1896, between Anne Gibson and Unity Gibson of Binelly, and Bernard Gibson of Binelly, in the county of Tyrone, farmer. Now, the said Bernard Gibson having been with the consent of said Anne Gibson and Unity Gibson accepted as tenant of that farm situate at Binelly, county Tyrone, with the houses thereon, they the said Anne Gibson and Unity Gibson agreed with the said Bernard Gibson to abandon to him all claims they have or might have had as next-of-kin of James Gibson, deceased, or otherwise, on the said farm of land and houses."

Devine read the agreement aloud in the presence of the said Bernard Gibson and his sisters, and he did not explain the nature and purport of the said agreement to them, and after the agreement had been read, Unity Gibson and Anne Gibson signed their marks at the foot thereof.

No other evidence was given on behalf of the appellant, and the Revising Barrister was not satisfied that the said Unity Gibson

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and Anne Gibson when executing the said agreement intended thereby to deprive themselves of their respective shares of their father's assets, or that previously thereto they had released their said shares respectively.

The Revising Barrister found as a fact that the said Bernard Gibson did not during the qualifying period occupy the qualifying premises as sole tenant or owner thereof, and he expunged his name from the list. If there was no evidence to support the above finding, the name of the said Bernard Gibson should be inserted on the list.

Serjeant Dodd, and *Andrew Todd*, for the appellant :—

A man *bona fide* in occupation with the consent of the next-of-kin is entitled to the franchise. Moreover, the appellant was accepted as tenant by the landlord : *M'Keever* v. *Buchanan* (1). The Revising Barrister had no jurisdiction to disregard this agreement.

Barnhill, for the respondent :—

This case is similar to *Brown* v. *Buchanan* (2) ; there was no evidence that the next-of-kin consented to give up their claim to a share of the assets. The present case is also undistinguishable from *Simpson* v. *Hanrahan* (3). In *Logue* v. *Riddell* (4) last year there was a similar agreement, but the decision went on the ground that there was evidence of sole occupation apart from the agreement.

SIR PETER O'BRIEN, L.C.J. :—

We are all of opinion that the Revising Barrister was wrong. It appears that the claimant was in possession of this farm. As far as the landlord could effect it he made him tenant. Then we have this document. What does the document on the face of it purport to do ? To assent on the part of the claimant's two sisters to the claimant being accepted as tenant; and I think the true effect of this agreement is that the two sisters gave up all claim to the farm *in specie*. Whatever right they might have to a distributive share of the assets in the course of administration they intended to give up all claim to occupy as tenants.

(1) [1894] 2 I. R. 312.
(2) *Ibid.* 318.
(3) Lawson's Notes, 1885-93, p. 98.
(4) Lawson's Notes, 1897, p. 164.

I think the evidence is all one way, and that the man was entitled to the franchise. The agreement was signed by these ladies; it was *prima facie* a valid agreement, and there was in the condition of proof before the Barrister no evidence to justify him in ignoring it. The case stated plainly means that, if we were of opinion that the Revising Barrister was not justified in disregarding the agreement, the claimant should be admitted to the franchise. We are all of opinion that the Revising Barrister was not justified in so doing, and that accordingly the man was entitled to the franchise.

FITZ GIBBON, L. J. :—

It is not now possible for us to lay down, as a rule of law, that a man who occupies land as the only tenant who is recognised by the landlord to whom he pays the rent, "occupies as tenant" for the purposes of the franchise law, when others live with him who have rights against the land as next-of-kin. I thought that this ought to be the law, and I struggled hard for it; but in several cases this Court has held otherwise. *M'Keever's Case* (1) went some way towards the principle I have stated, and I understand that we are not now going to recede from what was there decided. M'Keever was held entitled to vote because he was the tenant recognised by the landlord, and, although other members of his family who lived with him had claims as next-of-kin of a deceased tenant, both the Lord Chief Baron and Barry, L. J. held that because these claims did not give any right against the land "*in specie*," but amounted only to equitable claims against the assets of the deceased tenant, though they might be made ultimately effective against the land, through a suit in equity for an account, they did not displace the "occupation as tenant" which is sufficient to confer the franchise. This would be enough to decide the present case, even accepting the statement of the Revising Barrister that the claimant's sisters did not "deprive themselves of their respective shares of their father's assets," for they consented that their brother should be accepted as the sole tenant by the landlord, and consistently with such acceptance, they could only claim general relief as against the assets, and not specific relief against the land.

(1) [1894] 2 I. R. 312.

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It has been held that if next-of-kin consent to the recognition of one of themselves as sole tenant, the person so recognised is thenceforth entitled to "occupy as tenant," and to vote accordingly, notwithstanding that the other next-of-kin may have unsatisfied claims against the assets generally. A transaction precisely similar in kind occurs whenever, on the death of a relative, individual next-of-kin amicably distribute his property among themselves, without legal administration. For example, they take particular things, such as articles of jewellery, keepsakes, or the like, each for himself, with the consent of the rest. Thenceforth, each individual, by consent of all, becomes the sole possessor of a particular part of the assets, and I know no reason why the sole occupation of a farm, or of a house similarly acquired, should not satisfy the franchise law.

The necessary consent in this case was given before the document which the Revising Barrister set at naught was signed. The document says, "Bernard Gibson *having been*, with the consent of the said Anne Gibson and Unity Gibson, accepted as tenant of the farm." He was so accepted by the landlord. There is absolutely no evidence to contradict this distinct statement. It is attested by the previous acts of the landlord, as well as by the document. Even if we attach no more weight to the paper than we should do to parol proof that the sisters had said to a credible witness, "Our brother has been accepted as tenant of our father's farm, and we have consented to this," the contrary conclusion of fact could not be drawn without some rebutting evidence to support it. We may not like such documents; we may think that they are signed, or obtained, for the purpose of giving votes, or of getting rid of decisions felt to be adverse to the franchise; but these are lawful objects, as well when fathers make lodgers contracts with their sons, as when sisters consent to give up tenancies to their brothers, and when affirmative evidence has been given, such as we have here, a Revising Barrister cannot disregard it, without any evidence whatever the other way, merely because he is "not satisfied." This claim must be allowed.

WALKER, L. J., concurred.

HOLMES, L. J. :—

There are two facts found in the case stated—(1), that Gibson paid the rent of the qualifying premises in 1896, and got a receipt in his own name; and (2), that his two sisters who lived with him signed in that year a document that had been previously read to them, in which it was stated that he had become tenant of the premises with their consent, and that they had no claim thereon.

There was no other evidence of any kind; and I should think that the only possible inference was that Gibson was sole tenant, and in sole occupation. Last year the attention of the Court was called to the case of *M'Keever* v. *Buchanan* (1), in which, on a weaker state of facts, the finding of the Revising Barrister that the claimant was not in sole occupation was disregarded upon the ground, as I understand the judgments, that the facts amounted to conclusive evidence that he was in sole occupation, and, therefore, the finding was without evidence. I followed that case last year, and I do so again.

Solicitor for the appellant: *Philip O'Hagan.*
Solicitor for the respondent: *C. Mullin.*

R. D. M.

(1) [1894] 2 I. R. 312.

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Dec. 1, 2, 16.

KELLY *v.* THE QUEEN. In re THE ATTORNEY-GENERAL FOR IRELAND and THE GRAND JURY OF THE COUNTY OF MAYO (1).

Baronial guarantee—Treasury subvention—Certificate of arbitrators under Tramways (Ireland) Act, 1883—Excess of jurisdiction—Error in certificate—Grand jury—Presentment—Fiat of Judge of Assize—Certiorari—*Tramways (Ireland) Act*, 1883 (46 & 47 *Vict. c.* 43), *s.* 6.

The Grand Jury of the county of Mayo made a presentment guaranteeing a certain dividend on the share capital (£98,000) of a certain Light Railway Company, the undertaking to be worked by the W. & L. Railway Co., who were to retain 50 per cent. of the gross profits, and pay the other 50 per cent., or as a minimum, £51 a week to the new Company. The guarantee was not to commence to accrue until the undertaking was fully completed, taken over, and opened for traffic.

The presentment was ratified by Order in Council, and confirmed by statute, (54 Vict. c. i.), by which a subvention from the Board of Works was guaranteed in ease of the county.

The line was opened for traffic on the 1st May, 1894, but, upon the ground that the undertaking was not fully completed, the arbitrators (appointed by the Board of Trade under s. 6 of the Tramways (Ireland) Act, 1883) made no certificate for the half-years ending 31st October, 1894, and 30th April, 1895.

On the 20th December, 1895 (the undertaking having been meanwhile fully completed), the arbitrators made up their first certificate for the half-year ending 31st October, 1895, and therein included under expenditure payments (£819 13*s.* 9*d.*), which, though actually made during that half-year, were in respect of liabilities incurred in the two preceding half-years (though they only took into account the gross receipts of the particular half-year), and, as the result certified to a partial insufficiency of net receipts to meet dividend of £1773 19*s.* 2*d.*

The Grand Jury presented and levied this sum in 1896 (the presentment being fiated without opposition), and applied to the Board of Works for their subvention of a moiety of this amount. Investigation disclosing the error, the Board refused to contribute more than a moiety of the lesser amount (£1773 19*s.* 2*d.* less £819 13*s.* 9*d.*). This the Grand Jury declined to accept, and a Petition of Right was presented by the Secretary and Solicitor of the Grand Jury, praying for payment of a moiety of the amount certified and

(1) Before Lord Ashbourne, C., and Fitz Gibbon, Walker, and Holmes, L. JJ.

presented for from the Treasury without any deduction. At the trial, judgment was entered in favour of the suppliants.

The Crown obtained a writ of *certiorari* to remove the certificate and presentment into Court. On motion for a new trial of the petition, and argument on the return to the writ, the majority of the Queen's Bench Division held (*diss.* Palles, C.B.) that the certificate, with the presentment founded thereon, should be quashed, and that judgment should be entered for the suppliants for the less amount. *Held* (reversing the decision of the Queen's Bench Division), that the suppliants were entitled to judgment for the full amount claimed.

THE facts of the case are stated fully in the report of the case in the Court below—[1898] 2 I. R. 719.

The suppliants appealed.

The *Right Honorable The MacDermot, Q.C.*, *O'Connor, Q.C.*, and *Fetherstonhaugh, Q.C.*, for the suppliants.

The Attorney-General (*The Right Honorable John Atkinson, Q.C.*) and *Vesey Fitzgerald* (*Ronan, Q.C.* and *Bushe, Q.C.*, with them) for the Crown.

The arguments were the same as in the Queen's Bench Division.

The judgment of the Court of Appeal was delivered by— Dec. 16.

HOLMES, L.J.:—

The questions arising in Kelly's petition of right, and in the application of the Attorney-General to quash the certificate of the arbitrators have been treated in both the Queen's Bench Division and this Court as identical, and they involve no controversy on matters of fact.

It is unnecessary for me to refer in detail to the provisions of the Order in Council, under which, as confirmed by the local Act 54 Vict. c. i., the Claremorris extension of the Athenry and Tuam Railway was constructed. It is sufficient to say that it confirmed a presentment of the Grand Jury of county Mayo, guaranteeing in perpetuity a dividend to be paid by the entire county at the rate of £4 per cent. per annum upon the share capital of the Company not exceeding the sum of £98,000, and providing that this

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guaranteed dividend should not commence to accrue until the undertaking should be fully completed and taken over by the Waterford and Limerick Railway Company, and opened by them for public traffic.

In applying the provisions relating to arbitration contained in the 6th section of the Tramways and Public Companies (Ireland) Act, 1883, the Order in Council prescribed that the arbitrators should be appointed on or before the 1st May or 1st November, whichever should first occur after the opening of the railway for traffic; that the promoters should on or before the 20th June and 20th December in every year make out and deliver to the arbitrators an account for the then preceding half-year ending on the 30th April or 31st October, showing the amount of the paid-up capital of the undertaking, and a further account of all the receipts of every nature and kind for the then preceding half-year ending on the said 30th April or 31st October, arising in any manner from the said undertaking and the expenditure thereof; that the arbitrators should deliver their certificate in writing to the secretary of the Grand Jury before the 1st June and 1st December in each year, ascertaining and determining the amount in each half-year payable under the guaranteeing presentment; that this certificate should be laid by the secretary before the Grand Jury at the Assizes next after its receipt by him; and that the sum mentioned therein should be presented for, raised, paid, and applied in the manner provided by the seventh section of the Act of 1883.

Although the foregoing provisions describe the certificate as ascertaining and determining the amount payable under the presentment, they do not in my opinion confer any jurisdiction on the arbitrators, define the limits of such jurisdiction, or impose conditions on its exercise. All these matters are prescribed by the sections of the Act of 1883 to which I shall presently refer; and the object and effect of the portions of the Order in Council which I have quoted are merely to make directory regulations to assist them to discharge their functions under this statute. The statute confirming the Order in Council having become law in 1891, the railway authorised by it was so far constructed in 1894 as to be opened for public traffic by the Waterford and Limerick

Company on the 1st May in that year; and, before the 1st November following, the Board of Trade, without whose authority the line could not have been so opened, appointed three arbitrators pursuant to the provisions of the Order and the Act of 1883.

The Extension Company received from time to time from the Waterford and Limerick Company, in accordance with the terms of a working agreement, sums of money amounting in the half-year ending the 31st October, 1894, to £1122, and in the half-year ending the 30th April, 1895, to £1326.

These sums represented the traffic receipts of the line during the first year of its working, and presumably during the same period expenditure of some kind was going on; but the particulars of it, whether known to the parties to the present litigation or not, have not been brought to the notice of the Court. The arbitrators, after the termination of each of the half-years aforesaid, had a sitting, at which the Company, having previously delivered accounts purporting to be prepared pursuant to the provisions of the Order in Council, applied for the certificate therein prescribed; but on both occasions, yielding to an objection taken on behalf of the Grand Jury, they declined to proceed with the inquiry, on the ground that the line had not been completed, and that therefore the guarantee had not yet become operative.

This decision cannot fail to strike a lawyer as somewhat curious; but although the Company or the holders of the guaranteed stock might, by applying to the Queen's Bench Division for a writ of *mandamus*, have challenged its legality, it has been acquiesced in by all parties; and I agree with the Attorney-General that none of them can now escape from the consequences of this adjudication. At the same time it must be borne in mind that although the line must thus be assumed not to have been completed until the 30th April, 1895, it was legally open for traffic, and legally earning and expending revenue receipts for twelve months before.

The third sitting of the arbitrators was held on or about the 20th Dec., 1895; and they had before them an account prepared by the Company for the half-year preceding the 31st October then last past. Being of opinion that this account dealt with a period in which the undertaking had been fully completed, they entered on the functions prescribed in the 4th and 6th sections of the Act

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of 1883. Their duty as therein laid down was "to ascertain and determine the amount of the gross receipts" for the half-year in question; to ascertain and determine "the expenses of the management, working, and proper maintenance" of the railway for the same period, and by deducting the amount of such expenses from the gross receipts to fix the amount of the net receipts; and to ascertain and determine "any other matters which it may appear necessary to them to inquire into and determine in order to ascertain the amount which may be applicable out of the receipts of the undertaking to the payment of the guaranteed dividend, and the amount, if any, which the guaranteeing baronies are liable to contribute to such dividend." Such being the extent of the jurisdiction of the arbitrators, let us now see what was done by them on the occasion under consideration.

It may be assumed that the account delivered by the Company purported to set forth, on the one hand, the receipts of the undertaking for the half-year, and on the other its expenditure for the same time. It does not appear whether the arbitrators struck out, added, or altered any items in this account, but no objection has been taken to their ascertainment of the receipts. It appears, however, that the expenditure side of the account contained certain sums that represent payments on account of liabilities, which it is admitted had been incurred by the Company prior to the commencement of the half-year. The only information which the Court possesses regarding these items is what can be derived from the vouchers that were given in evidence on the trial, and are said to have been laid before the arbitrators. These documents show that all the payments were made within the half-year, but that some of them were for work done, or to repay money advanced for the use of the Company at an earlier date. There is no reason to suppose that the greater number of these debts were not incurred whilst the line was being worked by the Waterford and Limerick Company, but there is at least one payment to the engineer, part of which was made in respect of a liability that had accrued before the railway was opened for traffic, and there are possibly other items of the same kind. All these sums were allowed by the arbitrators as expenditure to be deducted from the gross receipts; and the principal question for decision is whether this determi-

nation was within their jurisdiction. Colonel O'Hara in his evidence says, "the vouchers were submitted to us, as far as they could, and we examined them. The vouchers show that the expenditure included that of two previous half-years. We included these in our award. We did this in perfect good faith, as we believed we should allow the expenses." These words have been relied on as an admission that the arbitrators, having first adjudicated that the sums in question were expenses of an earlier half-year, nevertheless determined to give credit for them. I do not think that this is the fair inference. The evidence taken as a whole merely means that although the arbitrators were aware that the money was paid in discharge of earlier debts, they were of opinion that it ought to be regarded as an expense of the current half-year.

I have already quoted the portions of the 4th and 6th sections of the Act of 1883 that define the jurisdiction of the arbitrators. Their certificate ought to be looked at as a judicial decision to be arrived at in exercise of the jurisdiction so conferred. As in the case of other inferior tribunals, the machinery of *certiorari* can be used for the purpose of preventing them outstepping the limits of their authority; but within those limits they are the final judges. Why was the provision regarding arbitration introduced at all? The reason I think is manifest. It is always a difficult and delicate task at the end of a year or half-year to ascertain the amount which is applicable out of the receipts of an undertaking like a railway to the payment of a dividend to shareholders. It involves the consideration of questions of law as well as of fact and the exercise of a sound and skilled discretion. Under ordinary circumstances the only parties interested are the Company and its shareholders; and in such cases, the duty is naturally left to their own auditors or other officers. But where a guarantee has been given under the Tramways Act, justice requires the interposition of some authority between the Company and the guaranteeing baronies. Hence the enactment authorising the Board of Trade to appoint three arbitrators, the extensive powers conferred on the arbitrators so appointed, and the provision that the certificate of any two of them shall be in all

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respects binding on the Grand Jury, the baronies, and the Company. Their jurisdiction is to ascertain and determine the amount of the gross and net receipts, and any other matters necessary in order to ascertain the amount applicable to the payment of the guaranteed dividend. These words are sufficient to empower them to adjudicate on all questions of law and fact that can arise in relation to the matters specified; and there is nothing in the policy and intention of the statute to require a narrower construction. Indeed, the policy and intention are the other way, inasmuch as the only means provided for enforcing the guarantee is the certificate of the arbitrators; and if this is not binding when it leaves their hands, it cannot be made so by any other tribunal, nor can its place be otherwise supplied.

The importance of the issue has led me to state the facts somewhat fully, and to discuss the jurisdiction of the arbitrators on principle; but I might have taken a much shorter course, for in truth the precise point arising in the present cases has been already decided by this Court. *The Blessington Steam Tramway Case* (1) was very fully considered, both in the Court of first instance and on appeal. I took part in the judgment in the Queen's Bench Division, and while recognising the very extensive jurisdiction conferred on the arbitrators I expressed the opinion that it did not enable them to treat as portion of the working expenses of the undertaking a sum of money that had not yet been paid. This view was dissented from by the Appellate Court, and further consideration has convinced me that it was not justified by the language of the statute. No such question is now before us, but this was not the only matter decided in the Blessington case. A large portion of the work included in the bill of costs which was the subject of discussion had been done in a previous half-year; and it was strongly urged that even if it had been actually paid in the half-year under review, the arbitrators would have had no jurisdiction to allow it. Gibson, J., decided the case on this ground, saying:—"To permit the defendants' liabilities of one half-year to come into the succeeding half-year is, I think, clearly contrary to the principle of

(1) 32 L. R. Ir. 644.

section 6, which prescribes and measures the liability of the ratepayers each half-year, and excludes the notion of retrospective taxation." The Court of Appeal dissented from this view as well as from the other, and held the certificate valid in all respects. The *ratio decidendi* is succinctly expressed by Fitz Gibbon, L.J.:—"Mr. Justice Gibson's judgment would go to this—that at midnight of the last day of each half-year every guaranteed company must rule its books, draw a hard and fast line, and either pay up every debt, or divide among the shareholders the money which is honestly required to pay actually existing liabilities. It is impossible that the business of such companies could be conducted, or that their accounts could be kept, in half-yearly 'watertight compartments.'" Here the very question before us is ruled, unless some distinction in principle can be shown between the Blessington case and the present. This was, I think, admitted by counsel for the Crown, and the ground of distinction chiefly relied on is that here the guarantee only began with the half-year in question, while in the former case it had been in existence when the liabilities accrued. I am unable to see how this curtails the jurisdiction of the arbitrators in determining what were the expenses of the half-year with which they were dealing. Under no circumstances does their jurisdiction go beyond this, but if they are empowered to decide that a debt paid within the half-year, although incurred previously, is an expense of the half-year, their power to do so, being wholly unconnected with the date of the commencement of the guarantee, cannot be affected thereby.

Before parting with this branch of the subject, there is one matter as to which I desire to state distinctly my individual opinion. It has been assumed in the argument on behalf of the Crown that the allowance of the outgoings in question was not merely illegal, but was so clearly illegal as to be only accounted for by the misconduct of the arbitrators. I think that it has been already stated by every member of the Court that there is not a particle of evidence of misconduct; but I wish to say, in addition, for myself that I am not satisfied that any of the payments were illegal. I have formed no opinion on the subject because—(1), I have not the materials to judge; and (2), even if I had, it is not my duty to do so. The arbitrators are the statutory authority to

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decide: their decision has been given; and, presumably, it has been rightly given.

Having thus disposed of the principal subject of discussion, the matters that remain can be dealt with very briefly. It has been argued that the certificate is bad *ex facie*, inasmuch as it does not state that the railway was completed; but this appears by necessary inference from averments that show that the railway was being managed, worked, and maintained during the half-year ending the 31st October, 1895.

It is further contended that the presentment is bad by reason of its not setting forth the section of the Act under which it was made. The answer is that it is immaterial whether the presentment was bad or good, as in either case the amount was legally included in the warrant and properly levied.

It has been also argued that the certificate is not binding on the Crown. I confess that I do not understand this point. The only binding force claimed for it is what belongs to the adjudication of a tribunal legally competent to decide. The judgment of a Court, acting within its jurisdiction, is as binding on the Queen as on her subjects; and the foundation of our decision is that the arbitrators acted within their jurisdiction in giving the certificate. The levy was, therefore, legal; and the event in which the contribution from the Exchequer became payable had duly happened.

For these reasons I am of opinion that the two appeals ought to be allowed, that the order quashing the certificate must be reversed, and that the judgment in the Petition of Right given by Mr. Justice Boyd must be restored.

I offer no opinion upon the effect of the fiat of the Judge of Assize when given to a presentment—a matter which is not free from difficulty, but which is not likely to be of much practical importance in the future.

Solicitor for the suppliants: *S. P. Redington.*
Solicitor for the Crown: *Sir P. Coll.*

R. D. M.

THE DUKE OF BUCCLEUCH AND THE DUKE OF ABERCORN, TRUSTEES OF THE DUKE OF MANCHESTER, Landlords; SAMUEL RAINEY, Tenant.

Land Com. 1898. May 4. *Appeal.* June 18.

Landlord and Tenant—Land Law (Ireland) Act, 1896—Section 50.

The effect of section 50 of the Landlord (Ireland) Act, 1896, is that an application to fix a fair rent which failed under the earlier Acts is not to be dismissed, if brought forward again, merely because it was not sustainable, or was dismissed, under the previous law.

But the section does not allow a proceeding to be brought a second time merely for the purpose of having a re-trial of a question of fact, upon which the law has not been altered.

Appeal from an order of a Sub-Commission fixing a fair rent upon the tenant's holding.

Jeremiah Neill was the previous tenant of the holding. He was evicted for non-payment of rent on a civil bill ejectment decree dated October 15, 1879. In March, 1882, John Rainey, father of the tenant, became tenant of the holding: he paid the landlord's agent the sum of £155, who thereupon said he would enter him in the Estate Books as the tenant and make him and Neill "all right." The evidence showed that John Rainey was unwilling to deal directly with Neill, and preferred to treat with the landlord's agent. John Rainey on the 1st February, 1883, paid his rent up to the 1st November, 1882.

After being paid the £155 by John Rainey, the landlord's agent gave a receipt to Neill in the following form:—"Received from Jeremiah Neill the sum of £105 5*s.* 7*d.* sterling for balance of rent due to his Grace the Duke of Manchester out of Ballymore and Tullyhue, and ending the 1st day of November, 1881 (one). Dated this 22nd day of March, 1882.—C. W. O'Brien."

In 1883 John Rainey applied to fix a fair rent of the holding, but the Land Commission dismissed his application on the

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grounds that he was not a present tenant. When making this application the tenant was not aware of the above-mentioned receipt having been given. The receipt was discovered long afterwards by a relative of Neill's, and handed to Samuel Rainey (the son of John Rainey) into whose hands the holding had passed.

After the passing of the Act of 1896, Samuel Rainey served an originating notice to fix a fair rent, and on the hearing of the same, the Sub-Commission fixed a fair rent. Both tenant and landlords required the case to be reheard before three Commissioners sitting together; and the case was heard at Armagh before Mr. Justice Meredith, Mr. Commissioner Wrench, and Commissioner the Hon. G. Fitz Gerald, Q.C.

C. Murphy, for the tenant.

G. H. Smith, for the landlords.

MEREDITH, J.:—

We have decided, as I have already mentioned in the case of *Holmes* v. *Chaine* (1), following a decision in the Land Commission Court in *Corvan* v. *Alexander* (2), that section 50, sub-sect. 2 of the Land Act of 1896, which has been read by Mr. Murphy, only applies where there has been a change or amendment in the law applicable to the particular tenancy. In such cases the previous decision does not operate as a bar, but where no change or amendment has been made in the law we have no jurisdiction to re-try this case. When this case was dismissed in 1884 the law applicable to the tenancy was regulated by section 20, sub-sect. 2 of the Act of 1881:—"Where the landlord has resumed possession of a tenancy from a present tenant, he may, if he thinks fit so to do, reinstate such tenant in his holding as a present tenant, and thereupon such tenancy shall again become subject to all the provisions of this Act, which are applicable to present tenancies."

It appears that in 1880 the former tenant of this holding, who was a man named Neill, was evicted for non-payment of the

(1) Unreported. (2) Unreported.

rent of the holding, the Civil Bill ejectment dated the 25th September, 1879, has been given in evidence, a decree was obtained on that, and a document dated the 16th February, 1880, has been proved by Mr. Atkinson, the solicitor for the landlord. [His Lordship read the document.]

That document shows that the landlord resumed possession of the holding from Neill, the former tenant, and, indeed, the fact is not disputed, and could not be disputed, having regard to the decision pronounced in 1884. Now sometime afterwards, namely in the month of March, 1882, a common enough arrangement was made by which Neill, the tenant, who had been evicted, was authorised to deal with Rainey, who wished to become tenant of the holding, and the arrangement was carried out through the Estate Office. On the 22nd March, 1882, Captain O'Brien, on behalf of the landlord, appears to have received a sum of £105 5*s.* 7*d.*, and to have given a receipt to Neill for balance of rent out of this holding, due and ending the 1st November, 1881. Mr. Murphy relies upon this receipt as clear evidence that the landlord (notwithstanding his resumption of possession) agreed to reinstate Neill in his holding as a present tenant, and to permit him to sell his present tenancy, as such, to Rainey. Undoubtedly, Rainey was accepted as tenant, and he puts in a receipt dated the 1st February, 1883, for rent of the holding up to the 1st November, 1882; and he was in this position when he came before the Court in 1884, that being the tenant in occupation of the holding, he was entitled to have a fair rent fixed, if the case now made was correct, that is to say, if the landlord had agreed to reinstate in his holding, as a present tenant, Neill, the vendor to Rainey. The Court heard the case. It is said that this receipt, which was given to Neill, was not before the Court; but I really do not think it affects the question one way or the other. Whatever the evidence before the Court may have been, there was a judicial decision and determination that the present tenancy, as it existed in Neill, had been absolutely put an end to, and that Rainey was tenant of a future tenancy. That decision is binding upon us unless the Act of 1896 has effected a change in the law applicable to this particular case. I offer no opinion as to whether that decision was right or wrong; it is a

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decision binding upon us. Now when I turn to the 18th section of the Act of 1896, and compare it with sub-sect. 2 of section 20 of the Act of 1881, I can find no difference or distinction whatsoever between them, or at all events none that assists the tenant:—"Where prior to the commencement of this Act," that is the Act of 1896, "the landlord of a holding has consented that the tenancy of the holding should be a present tenancy, or that the tenant should have the same rights as a present tenant, the tenancy shall be deemed to be a present tenancy accordingly." It is not alleged that any consent or arrangement was entered into with Rainey himself, to treat him as distinguished from his vendor, Neill, as a present tenant. It is not suggested that since 1884 there has been any consent or agreement to alter the status of Rainey. The case has been presented in the only possible way in which, having regard to the facts, it could have been presented, namely as a case in which the inference must be drawn from the acts of the landlord, that he agreed to reinstate Neill as a present tenant, and that Rainey is entitled to the benefit of that agreement. That case was equally open in 1884 under section 20, sub-sect. 2 of the Act of 1881, as it is to-day under section 18 of the Act of 1896. If the landlord ever consented to reinstate Neill in his holding as a present tenant, he did so before the decision was pronounced in 1884.

I really think we should be setting at naught our previous decision as to the operation and effect of former decisions, if we were to hold that the tenant is entitled to have a fair rent fixed (1).

Appeal. June 18.

The tenant appealed to the Court of Appeal (FITZ GIBBON, WALKER, and HOLMES, L.JJ.)

Wylie, Q.C., and *C. Murphy*, for the tenant (appellant).

Campbell, Q.C., and *G. H. Smith*, for the landlords (respondents).

(1) The judgment is printed from the short-hand writer's report used in the Court of Appeal.

FITZ GIBBON, L. J.:—

It is quite clear, upon the Act of 1896, sect. 50, that an application which failed under the Act of 1881 is not to be dismissed, if brought forward again, merely because it was not sustainable, or was dismissed, under the previous law. But section 50 does not allow a proceeding to be brought a second time, merely for the purpose of having a retrial of a question of fact, upon which the law has not been altered. This was held by this Court in the unreported case of *Brown* v. *M'Brien* (15th November, 1897).

The new law upon which the appellant relies, as entitling him to fix a fair rent, is to be found in section 18. In order to obtain the benefit of sect. 18, the appellant must show that the landlord consented that he "should have the same rights as a present tenant." Mr. Wylie has ingeniously endeavoured to establish this position by arguing that the circumstances under which the tenant was put into possession of the holding amounted to a representation by the landlord that he intended to give Rainey the rights of a present tenant; and therefore that the landlord is now estopped from denying that he consented to a present tenancy. But precisely the same estoppel must have existed, if at all, at the time of the former decision. All the facts from which it is now said to arise had then taken place, and a present tenancy then would have entitled the tenant to fix a fair rent. The issue then knit between the parties was the same as it is now, viz. what was the real nature of the transaction between Rainey and the landlord? Whether did Rainey become tenant as the assignee of Neill, and as a present tenant; *or* did he come in under a new and original contract of tenancy with himself, and as a future tenant? The transaction took place in 1883, when landlords and tenants were quite alive to the difference between present and future tenancies. In 1884 the Land Commission considered the transaction, and as the tenant's application was dismissed, it must have been decided that there was, as a matter of fact, no re-instatement of Neill's tenancy, and, therefore, that Rainey had come in, not as an assignee of any old or "present" tenancy, but as a new and independent, and therefore as a "future," tenant.

The evidence shows that, when arranging to get the holding, Rainey tried, as far as possible, to avoid mixing himself up with

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Neill, or with Neill's tenancy. Though the sum he was to pay was to clear off all scores with Neill, Rainey negotiated the matter directly and exclusively with the estate agent. The evidence offered now is the same as that on which the Land Commission decided the question in 1884, the only additional bit of proof being the receipt, which, in my opinion, carries the matter no further. I decide the case upon the ground that the question of fact which was decided in 1884 cannot now be re-opened, upon a retrial of the same facts, and that there has been no change in the law which is applicable to those facts.

WALKER, L.J., I concur.

HOLMES, L.J.:—

The unreported judgment of this Court in *Brown* v. *M'Brien* has deprived the appellant of his principal argument. It was held in that case, that the 50th section of the Land Law (Ireland) Act, 1896, does not entitle a tenant, who has already applied unsuccessfully to have a fair rent fixed, to have re-opened a question of fact or a question arising under the previous law that has been decided against him; but that its object and effect are confined to enabling him to take advantage of any change in the law made by that Act, if he shall continue in possession. In the present case, the transactions of 1882 lead to one of two inferences, and there is no room for a third. They resulted either in a re-instatement of Neill as a present tenant, or in the creation of a new tenancy, wholly unconnected with the old one, in Rainey. If the first of these alternatives be taken, Rainey would have been entitled in 1884 to have a fair rent fixed; but this was then decided against him. If the latter be taken, Rainey was not entitled then, nor has there been any change in the law to entitle him now. In either case, his originating notice is unsustainable. I may add that there was no material addition to the former evidence on the last hearing. The receipt to Neill was not produced on the first occasion; but the fact appearing in it was admitted; and its production ought not to have affected the result.

Solicitor for the tenant: *Harris.*

Solicitors for the landlord: *E. D. Atkinson & Sons.*

G. Y. D.

M'GETTIGAN *v.* THE NORTH-EASTERN RAILWAY COMPANY OF ENGLAND (1).

Q. B. Div.
1899.
Feb. 28.
March 4.

(1899. No. 1364.)

Practice—Order giving leave to issue and serve writ out of the jurisdiction—Contract alleged to be made in Ireland with agent—Construction—Motion to set aside the order—Order XI., Rule 1.

The plaintiff entered into a contract with a steamship company in Ireland for the through carriage of certain live stock from Londonderry to York. The carriage necessitated the live stock being taken to Liverpool, and thence by two lines of railway to their destination.

Held, on the construction of the contract and on the facts, that there were three independent contracts with the steamship company and the two railway companies; that the contracts with the railway companies were made and to be performed in England; and that, consequently, an order giving leave to issue and serve a writ out of the jurisdiction, in an action for a breach at York of one of these contracts, could not be maintained, and should be discharged.

MOTION, on behalf of the defendants, to discharge an order giving leave to issue the writ in this action for service out of the jurisdiction, and to serve same on the defendants' secretary at their head office in England.

The plaintiff's claim was for £110 12*s.* 8*d.* damages sustained by reason of the defendants' breach of contract to safely carry 58 head of cattle from Londonderry to York, and there deliver them to him. The facts and circumstances giving rise to the action and the present motion are set out in the judgment of the learned Judge.

G. Fitz Gibbon, for the defendants:—

As the facts now appear the order should be discharged. The Steamship Company were not the agents of the defendants. The plaintiff's contract with the defendants was an independent contract, made and to be performed in England. The defendants

(1) Before JOHNSON, J.

Q. B. Div. 1899.

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collected the freight as a matter of convenience to the other companies interested. This has been their practice for twenty-five years in dealing with the plaintiff. [He referred at length to the affidavits.]

Drummond, Q.C., and *Gallagher*, for the plaintiff :—

The contract was made in Ireland with the Steamship Company as the agent of the defendants. It is a contract for a through carriage from Londonderry to York, and the defendants collected the freight for the full journey. Their receipt shows that they treated the plaintiff as their debtor. [They referred to the following cases :—*Tuohy* v. *The Great Southern & Western Railway Company of Ireland* (1); *Cumming* v. *The Great Northern, Manchester, Sheffield, and Lincolnshire Joint Railways* (2); *Foulkes* v. *Metropolitan Railway Company* (3); *Gill* v. *Manchester, &c., Railway Company* (4).]

March 4.

JOHNSON, J. :—

This is a motion to discharge an order made on the 20th February last, under the authority of Gen. Ord. XI., Rule 1, par. (*f*), giving the plaintiff leave to issue and serve a writ of summons, out of the jurisdiction, on the defendants, the North-Eastern Railway Company of England, by serving it on their secretary at their chief office at York, claiming damages for breach out of the jurisdiction of a contract alleged to have been made within the jurisdiction. The plaintiff obtained that order on affidavits stating that he entered into a contract with the defendants at Londonderry through their agents the Belfast Steamship Co. (Ltd.), for the carriage of fifty-eight head of cattle from Londonderry to York, there to be delivered to the plaintiff : that in breach of their contract the defendants delayed the delivery of the cattle to him at York whereby he sustained damage, and that the action could be more conveniently tried in Ireland than at York. In support of the present motion affidavits have been made by Mr. Pim, secretary of the Belfast Steamship Co. (Ltd.), and Mr. Butterworth, solicitor for the defendants, to which the plaintiff has replied by further affidavits.

(1) [1898] 2 I. R. 789.
(2) [1894] 2 I. R. 209.
(3) 5 C. P. D. 157.
(4) L. R. 8 Q. B. 186.

Mr. Pim states that the Belfast Steamship Co. (Ltd.) never were agents for or had power to contract as agents for the defendants, and did not enter or purport to enter into the alleged contract with the plaintiff as agents for the defendants. Mr. Butterworth states that the contract was made between the plaintiff and the Belfast Steamship Co. (Ltd.): that the defendants were no parties to it or authorised it: that the cattle were carried by the Belfast Steamship Co. (Ltd.) to Liverpool, and there handed over to the London and North-Western Railway Co., who delivered them to the defendants at Leeds to be carried forward to York: that defendants are incorporated by statute, having their head office in York: that they have no office or property in Ireland: that the Steamship Co. never were the agents of the defendants, or authorised to contract on their behalf; and that the defendants have no agent in Ireland or anyone in Ireland authorised to contract for them. He further states that these cattle were carried from Londonderry to York at a through rate, and that under the rules of the Clearing House the defendants, as the delivery company, were responsible to the other companies, parties to the through rate, for the collection of the charges due in respect of the carriage of the animals. The plaintiff in his further affidavit states that he has been shipping cattle from Londonderry to York for the last twenty-five years: up to the last two or three years, by various routes, to Normanton and Leeds, and thence by defendants' line to York; but, for the last two or three years, only by the Belfast Steamship Co. (Ltd.) from Londonderry, and from Leeds by the defendants' line at a through rate from Derry to York paid by plaintiff in York to defendants "on foot of the contract entered into at Derry with the Belfast Steamship Co. (Ltd.) as agents of the defendants." The defendant company is plainly an English company, and the affidavits do not state or refer directly or indirectly to any express agreement between these companies. There is, therefore, evidence that these animals were received by the Belfast Steamship Co. (Ltd.) at Londonderry for through carriage to York by three companies, viz. by the Steamship Co. to Liverpool: by the London and North-Western Railway Co. from Liverpool to Leeds; and by

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the defendants from Leeds to York: at a through freight received at York by the defendants, who were accountable to the other two companies for their rateable parts of the through freight to be ascertained through the medium of the Clearing House. This is similar to the through traffic at through rate which the Railway Commission in the public interest is, by several statutes, empowered to enforce without creating any partnership between the companies or constituting any one or more of them agent or agents or representative or representatives of any other or others of them to bind any other or others of them by contract.

Then there are these two documents exhibited in the affidavits. The first, after the reference number, is headed: "Through"; "The Belfast Steamship Co. (Ltd.)"; "Contract Form for the Conveyance of Live Stock"; "Conditions of Carriage." Then, after the date, follows:—"The Belfast Steamship Co. (Ltd.) give notice that they carry Live Stock to Liverpool only"; (that is definite, because the animals are to be conveyed through, partly by sea and partly by rail, to other places); "and they receive the Railway Company's charges only for the convenience of the consignor and as his agent, and for the purpose of being paid over to the Railway Company"; this shows that their contract with the plaintiff was for themselves only, and for sea carriage to Liverpool, and there to place the cattle with a railway company to be forwarded to their destination; and that if the consignor desired to pay the through freight at the commencement of the carriage to the Steamship Co., then, to convenience him, and as his agent, they will pay over so much of it as does not belong to themselves to the Railway Company: then follow their own conditions for their carriage of the cattle; and at the end of these conditions they inform the consignor what are the conditions on which the railway companies, by which the cattle will be conveyed to their ultimate destination, carry live stock. Then comes: "From Londonderry to York, *via* London and North-Western Railway." "Consignee, self; address, York," with the number and description of the animals and the sums to be paid with the through freight. This the plaintiff signed. Thus the Steamship

Co. bound themselves to the plaintiff to hand the cattle to the London and North-Western Railway at Liverpool, who, it is clear, since the Railway and Canal Traffic Act and Amending Acts, having facilities for carrying the cattle, were bound and compellable to carry them, even if not as common carriers, at all events as ordinary bailees, with power, by reasonable conditions, to limit their liability, so far as their system extended, and then to hand them over to the defendants, who were under similar liability to convey them to their destination, where the plaintiff as he had done for many years, was to pay the through freight and get his cattle.

The other document produced is the receipt from the defendants to the plaintiff: but this, I do not think, carries the plaintiff's case further. It was given to the plaintiff at "York," that was where he received the cattle: his uniform practice for twenty-five years had been, without regard to the route by which his cattle reached defendants' line at Normanton or Leeds, to pay the through freight to the defendants, leaving them to settle with the other companies: thus he had always been dealt with by the defendants as their debtor for the entire amount; and this explains "Dr. to the N.-E. Ry. Co." on the receipt for the amount of the through freight and charges.

I therefore think that there was not one but a succession of independent contracts. 1st, The express contract by the Steamship Co. with plaintiff to carry his cattle by sea to Liverpool, and hand them to the London and North-Western Railway Co.; 2nd, The implied contract by London and North-Western Railway Co., having received his cattle, to convey them on their system, and hand them to defendants; and 3rd, The implied contract by the defendants with plaintiff, having received his cattle, to convey and deliver them to the plaintiff at York on payment of the through freight and charges; and that the alleged breach, if any, was a breach at York of defendants' contract with plaintiff in England by receiving his cattle at Leeds to carry them from Leeds to York, and there deliver them to plaintiff.

In my opinion, therefore, the contract between the plaintiff and the defendants was made in England, and broken (if at all)

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Johnson, J.

by defendants in England. Having so decided the case on the principal point, it is unnecessary to say anything on the question of cost and convenience.

The order of the 20th February last must, on the facts as they now appear, be discharged with costs.

Solicitor for plaintiff: *P. M. Gallagher.*

Solicitors for defendants: *F. Sutton and Son.*

J. M°G.

IN THE MATTER OF THE SUPREME COURT OF JUDICATURE (IRELAND) ACT, 1877, AND OF AN INTENDED SUMMONS IN WHICH THE CITY OF DUBLIN STEAM PACKET COMPANY IS APPLICANT; AND W. J. COOPER, EDWARD WEBB, AND PATRICK WEBB ARE RESPONDENTS (1).

Q. B. Div. 1899. April 20.

Practice—Interpleader summons—Leave to issue and serve out of the jurisdiction—Ord. XI., R. 10; *and Ord. LXXXVI., R.* 1.

The Court has power to, and will in a proper case, give leave to issue and serve an interpleader summons out of the jurisdiction, although no writ has been sued out against the applicant in relation to the subject matter of the proposed interpleader proceedings.

APPLICATION on behalf of the City of Dublin Steam Packet Co. for liberty to issue an interpleader summons for service out of the jurisdiction on W. J. Cooper, at 14, Backbow-lane, Liverpool.

The application was supported by an affidavit setting forth facts which justified an order for interpleader being made in favour of the Company, as stakeholder of a sum of £54 8*s*. The respondent, W. J. Cooper, who resided as above stated out of the jurisdiction, claimed the whole sum. Each of the other two respondents, who resided within the jurisdiction, claimed a part of the fund. But, their joint claims covered the whole fund. The affidavit set out the residence of the parties, and that the Company carried on business in Dublin. No writ had been issued by any of the respondents at the date of the application.

(1) Before JOHNSON and MURPHY, JJ.

Q. B. Div. 1899.

CITY OF DUBLIN STEAM PACKET CO. v. COOPER.

William Moore, for the applicants (1) :—

This is an application for leave to issue and serve an originating summons out of the jurisdiction. Order LXXXVI., Rule 1, defines an originating summons. The order asked for can then be made under Order XI., Rule 10 : *Keane* v. *Crozier* (2); *Credits Gerundeuse, Lim.* v. *Van Weede* (3); *In re Busfield* (4). [He stated that Cooper was willing to come in and submit to the jurisdiction, but that the applicants wished to have him before the Court, by order, so as to prevent the other respondents from raising the question of jurisdiction.]

JOHNSON, J. :—

We think this order should be granted. There might be difficulty in sustaining it, if the respondent, Cooper, were not willing to come in and submit to the jurisdiction. But, we think that the same reason as that given in the case decided by Baron Pollock, applies with equal force in this case, namely, that the summons is merely a notice calling on him to come in and prove his claim (5).

Solicitors for the applicants: *Baker & Ringwood.*

J. M°G.

(1) The application had been made, *ex parte*, the preceding day to Gibson, J., who directed it to stand for the Divisional Court.

(2) 27 I. L. T. Rep. 81.

(3) 12 Q. B. D. 171.

(4) 32 Ch. D. 131.

(5) In a previous unreported case Murphy, J., had granted an order on a similar application. Again, in *Baird* v. *The Ards Recreation Society*, a similar order was granted on the 5th November, 1896. [*Per* Mr. H. V. Yeo, Registrar.]

But in the matter of an application by John Lincoln, a similar order was refused by O'Brien, J., on the 25th February, 1899, on the ground that no writ, originating summons, or process had been, at the date of the application, issued in relation to the subject-matter thereof, as required by sect. 1 of the Interpleader Act. [REP.]

IN RE AN ARRANGING DEBTOR; EX PARTE VAGG (1).

Appeal.
1899.
Feb. 3, 10, 13, 25.

Bankruptcy — Arrangement — Judgment creditor — Evidence — Consideration — Proof of debt utilized to carry arrangement — Estoppel.

A., being desirous of raising a loan for the purpose of consolidating the mortgages on his estate, employed V., a mortgage broker, to obtain the money for him on an agreement in writing that V. should receive £3 per cent. commission on the amount of the loan, if he got a firm offer. V. entered into negotiations with W. & Co., a firm of solicitors in London, who had a client willing to advance the money, on good title and proper security. V. negotiated for some time between the parties, and some of the terms were arranged, when A. proposed a larger loan than that originally sought, and the negotiations terminated. V. sued A. for £1050, the amount of his commission, and though A. delivered a defence, he did not appear at the trial. On the 11th January, 1895, V. obtained judgment for the full amount claimed and costs. On the 12th January, 1895, A. presented a petition for arrangement to the Court of Bankruptcy in Ireland, by which he proposed to vest his estate in M., one of the Official Assignees (who was to act as receiver and manager over the estate), upon trust, after payment of the rent and outgoings, the costs, and a sum for maintainance to the petitioner, to pay the unsecured creditors till they were paid in full. V. proved his debt, and the arrangement was carried—V.'s proof being used to carry the arrangement—at the first and second private sittings. In April, 1897, the first dividend was paid to the creditors, including V. In February 1898, a second dividend was about to be paid, when M. applied to have V.'s proof of debt expunged, as there was no *bona fide* consideration for it:—

Held (reversing the decision of Boyd, J.) that, whether there was good consideration for V.'s debt or not, M. was not entitled to have it expunged, as without it the arrangement under which M. had been appointed receiver, could not have been carried, and M.'s status as receiver, and his right to represent the creditors depended on the existence of V.'s debt.

In the year 1893 the arranging debtor, being desirous of obtaining a loan of £35,000 upon the security of certain landed property in Ireland, entered into negotiation with Edwin H. Vagg,

(1) Before LORD ASHBOURNE, C., and FITZ GIBBON, WALKER, and HOLMES, L.JJ.

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In re ARRANGING DEBTOR; *Ex parte* VAGG.

a mortgage broker in London, for the purpose of raising the money. On the 1st November, 1893, an agreement was signed by the debtor in the following form—"I hereby authorise and request you to obtain for me the sum of £35,000 or such other sum as I may agree to accept by way of mortgage, on the undermentioned security. In consideration of your procuring the money ready to be lent and acting as my agent in respect to the said proposed loan, I hereby agree and undertake to pay you a commission or procuration fee of £3 per cent. on such sum as aforesaid, or on any greater or lesser sum that may hereafter be agreed to be lent, and I hereby charge the undermentioned security with the payment to you of commission as aforesaid. In case I fail to furnish a good title to the said property, or the proposed loan be not completed through any fault of my own, I agree to pay you the said commission for your services as and for liquidated damages."

The security referred to was the arranging debtor's life interest in the income of about £13,398 derived from certain estates in Ireland, subject to two jointures of £975 and £1365, and a further sum of £300 a-year, with policies of insurance either already effected or to be effected for any sum which the lenders might think fit. The proposed loan was to be a first charge on the life interest and the policies of insurance in question.

The agreement contained this further clause—"A firm offer to be given under this commission note within seven days after from the receipt of a copy of the rent roll, otherwise the same shall be null and void." The existing mortgages upon the estate amounted to £39,000. Vagg proceeded to negotiate with a firm of solicitors in London, Witham, Lambert, and Roskell, with whom he had a correspondence and several interviews. They had a client who was about to be paid a sum of £35,000 from the Court of Chancery, and who was willing to lend the amount if the security was considered good. It was agreed that the rate of interest was to be £6½ per cent. reducible to £5½; a prior mortgage for £20,000 was to be postponed to the proposed loan. The abstract of title and rent roll were urgently asked for by Vagg from the arranging debtor's solicitors. These negotiations continued until the month of December, 1893, when the arranging debtor's solicitors

proposed to increase the loan to £50,000 with some additional security; this was refused by Witham & Co. on behalf of their client, and the negotiations fell through. In April, 1894, Vagg issued a writ against the arranging debtor for £1050, the amount which he claimed for commission, and a statement of defence was delivered. The case was tried before Grantham, J., on the 11th January, 1895, but the defendant was not represented, and judgment was obtained for £1050 and costs.

On the 12th January, 1895, the arranging debtor presented a petition for arrangement to the Court of Bankruptcy in Ireland, and in his statement of liabilities he included the debt, but stated that he got no consideration for it, and that he disputed it. On the 10th June, Vagg proved his debt at £1141 14*s.* 10*d.*, and the proof was admitted subject to the right of the Official Assignee to object to it after the second sitting. On the 23rd June, 1895, the first private sitting was held, when the debtor's proposal was approved of. The proposal was to lodge in Court on behalf of the petitioner within one fortnight from the confirmation of the proposal the sum of £2000 to be applied without any deduction for costs or expenses rateably among his unsecured creditors, that all the petitioner's property should be vested in the Official Assignees, and that A. K. M'Entire should be appointed receiver pending the matter over the estate, the moneys received by him to be applied, after providing for Court duties and expenses, and the remuneration of the receiver and the costs and expenses of the petitioner and his creditors, in payment of all proper outgoings, in connection with the estate, and in the next place in payment in due priority of the interest, instalments, and insurances (if any), payable in respect of the incumbrances thereon, and the surplus therefrom to be applied (after payment of maintenance to the petitioner), in payment of the unsecured debts till the same were paid in full. On the 6th July, 1895, the second sitting was carried, and upon both of the sittings the arranging debtor used the proof of Vagg to carry his arrangement. The debts proved at that time by assenting creditors amounted to £1623, so that without Vagg's proof the petitioner would not have had the statutory three-fifths majority in value of the creditors.

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On the 2nd April, 1897, the first dividend was paid, and Mr. Vagg was paid a dividend among the other creditors. On the 2nd February, 1898, a second dividend became payable, and on the 4th March a stay was put on any further payment to Vagg. On the 12th May, 1898, Vagg applied to remove the stay. He was summoned for cross-examination before Boyd, J., and attended on the 3rd June, 1898, and gave evidence in reference to his claim against the arranging debtor A considerable amount of evidence was given to show that there was never a completed contract to obtain the loan, and nothing that could be termed a firm contract, but that the most that the negotiations amounted to was a proposal, which had been accepted, that on producing a good title and a rent roll, the money would be advanced. Accordingly, on the application of Mr. M'Entire, Vagg's debt was expunged (1).

Mr. Vagg appealed.

(1) The judgment of Boyd, J., in the Queen's Bench Division, Bankruptcy, was as follows:—

1898. Nov. 15. BOYD, J.:—

In the year 1893 the debtor, being desirous of obtaining a loan of £35,000 upon the security of his property in the county of Galway, was introduced to Mr. Vagg, who undertook to endeavour to obtain the same. The terms under which Mr. Vagg agreed to act in the matter and the security proposed for the said loan are set forth in a document prepared by Mr. Vagg and signed by the debtor and dated the 1st day of November, 1893. That document is in the words following. [His Lordship read the agreement, the substance of which is given, *ante*, p. 384.]

For the purposes of this motion the important clause is the second. The final supplementary clause has also been much relied on during the argument; but I do not think it very material, except as to some extent defining the meaning of the second clause. By the second clause Mr. Vagg would be entitled to a commission of £3 per cent. on the amount of the loan in the event of his "procuring the money ready to be lent." He contends that he did; and the question is, did he do so? The clause also provides that he should be entitled to the commission "on any greater or lesser sum that may hereafter be agreed to be lent."

There can be no question that he made some efforts to get the money; but apparently there was only one lender, a client of a firm of solicitors named Witham, Lambert & Roskell, who ever responded to his overtures.

On the 4th of November, 1893, this firm of solicitors wrote to Mr. Vagg—"Possibly we might have an available fund a little later on, and we hope to

Serjeant Dodd and *Robert Doyle*, for the appellant:—

The Official Assignee has no interest in setting the judgment aside; it is admitted that the judgment is good against the arranging debtor, and the only effect of setting it aside would be that the other creditors would be paid a little sooner. In any case the dividend already paid cannot be recovered: *Re Flateau* (1); and the trustee has been guilty of such *laches* that he ought not now to be allowed to challenge the appellant's proof of debt. It is three years since Vagg's debt was proved, and it cannot be questioned now. We admit that the Court of Bankruptcy has jurisdiction to go behind a judgment, and inquire into the validity of a debt; but that is not done as a matter of course, but only when there is evidence that the judgment has been obtained by fraud or collusion, or that there has been some miscarriage of justice; *Ex parte*

be able to write you more explicitly in a week or ten days. Meanwhile, perhaps, you will let us know the rate of interest." To which Mr. Vagg replied, on 6th November—"The interest, I think, should not exceed £5 per cent.; but if it be absolutely necessary" (the borrower) "would probably consent to pay a slightly increased rate as an *inducement to get the matter through forthwith*." On the 11th November the said solicitors wrote to Mr. Vagg—"We are not sure yet if our client will lend the money, &c.," to which Mr. Vagg replied on the 13th November—"When you are in a position to make me the offer of the money on stated terms, I have no doubt some satisfactory arrangement could be arrived at." On the 22nd November the solicitors wrote—"We have seen our client, who is in this position. He is disposed to entertain the loan on terms to be arranged, &c."

Some correspondence ensued as to the sum to be advanced being increased to £45,000, some additional security being given by the debtor, and on 29th December the solicitors wrote to Mr. Vagg—"We sent on a copy of your letter of the 14th inst. to our client, and we have only just had an opportunity of seeing him. He has apparently been speaking to some friends on the subject, and this new suggestion has altered his views altogether, and we are afraid now that he has made up his mind not to enter into the transaction at all"; and again, on 3rd January, 1894, the solicitors wrote—"Our client now objects to lend at all, and therefore the extra percentage would not influence him."

There is some further correspondence between a firm of solicitors named Arnold Williams & Co. (employed by Mr. Vagg), and the arranging debtor, in

(1) 22 Q. B. D. 83.

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Lennox (1); *Re Flateau* (2); *Re Troup* (3); *Re Fraser* (4); *Re Saville* (5). But this is not a case in which there are any suspicious circumstances about the judgment, such as existed in *Re Tollemache* (6): on the facts proved, the appellant procured a party ready and willing to lend the money, and is fairly entitled to be paid his commission.

If the judgment is now set aside, it would appear to be gone altogether, for if the debtor gets his certificate, he could plead it in bar to any action which might be brought upon foot of the consideration for the judgment: *Ellis* v. *M'Henry* (7).

But a stronger ground of objection to the proceeding of the trustee lies in this—Vagg's proof of debt was used to carry the arrangement at the first and second sittings, for without it the debtor would not have had the statutory majority of the creditors. There is an estoppel against the debtor and his trustee from

which they demand payment of the commission, and the arranging debtor repudiates his liability on the ground that he never got any offer of the money.

There has been given in evidence, on behalf of Mr. Vagg on this motion, an affidavit made by Mr. Witham, one of the abovementioned firm of Witham, Lambert & Roskell, in which he states—"I believe he" (his client) "had made up his mind to lend the money," and that on the 24th November he had informed Mr. Vagg of the fact "that my client *was disposed* to entertain the same."

Mr. Vagg was examined before me; but I do not consider his evidence material. He endeavoured to make out that he had received a firm offer for the loan, but could not state any facts not disclosed in the above correspondence.

On a careful review of the correspondence and the evidence, I can find nothing to show that Mr. Vagg ever procured a firm offer of the money, or that he "*procured the money* READY TO BE LENT," as provided by the agreement of 1st November, 1893, on which condition alone he was entitled to receive the commission he claims. I therefore find that he has not substantiated his claim in this Court to prove as a creditor for the amount of his commission.

It has, however, been contended on his behalf that his proof having been heretofore admitted in the matter, no grounds have been disclosed in law for expunging the said proof. This case first came into Court as an ordinary petition for arrangement filed by the debtor. The statutes provide the course

(1) 16 Q. B. D. 315.
(2) 22 Q. B. D. 83.
(3) [1895] 1 Q. B. 404.
(4) [1892] 2 Q. B. 633.
(5) 4 Mor. Bank. Cas. 277.
(6) 14 Q. B. D. 606.
(7) L. R. 6 C. P. 228.

challenging the debt, without which the trustee could not have been appointed: *Ex parte Lennox* (1); *Smith* v. *Baker* (2).

Ronan, Q.C. and *Ignatius O'Brien*, for the Official Assignee:—

It is admitted that the Court of Bankruptcy has power to go behind a judgment, and require the judgment creditor to prove the consideration: *Ex parte Kibble* (3); *Ex parte Banner* (4); *Ex parte Kitso* (5); *Ex parte Revell* (6); *Ex parte Anderson* (7); *Re Fraser* (8). The Court may go behind a judgment not only at the instance of the trustee, but of the debtor himself, even though the judgment debtor has consented to the judgment: *Ex parte Lennox* (1). On the facts we submit two propositions—1. That this sum of £1141 is not an honest debt due to Vagg; and 2, if not, Vagg is not entitled by law to be paid in equal priority with the other creditors.

to be followed in such a case. After the meeting of the creditors an offer is sent out to his creditors by the debtor. If the debtor desires to obtain the statutable majority of his creditors in favour of the offer made by him, it is obviously his interest not to actively dispute the claims made by creditors who will support his proposal, and unless other creditors ask for a proof of debt sitting to test the validity of the proofs so admitted, the Court has no means of ascertaining whether the claims of friendly creditors are well founded.

In his statement of affairs in this case the debtor returns Mr. Vagg, in List D., as a creditor for £1126 9*s.* 10*d.*, for which he received no consideration, and disputes the debt, and states that "judgment has been obtained at the instance of this claimant."

The Court, at the instance of the debtor, by order of 24th May, 1895, directed a proof of debt sitting, which was held before the Chief Clerk on 10th June, 1895.

At this sitting Mr. Vagg appeared by his solicitor in support of his claim, and no evidence having been given by the debtor adverse to it, other than the above statement, the Chief Clerk returned him as a creditor for £1141 14*s.* 10*d.* At this date the Official Assignee was not a trustee for the general creditors, the vesting resolution not having been then passed. He, however, asked that his rights should be reserved in case the proposal of the debtor should be

(1) 16 Q. B. D. 315.
(2) L. R. 8 C. P. 350.
(3) L. R. 10 Ch. App. 373.
(4) 17 Ch. D. 480.
(5) 22 Ch. D. 529.
(6) 13 Q. B. D. 720.
(7) 14 Q. B. D. 606.
(8) [1892] 2 Q. B. 633.

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Lapse of time is no bar, because a trustee in bankruptcy is always entitled to expunge a proof, though the creditor retains any dividends received.

Vagg was only entitled to commission if he obtained a *firm* offer, and the evidence showed that there was no *firm* offer, but the furthest to which the negotiation went was to obtain a statement from Witham & Co. that they had a client who would advance the money on good title being shown, and the rent roll of the estate produced. Then a larger loan was proposed, and the whole thing came to an end. The action, before Grantham J., was undefended, as the arranging debtor had, at that time, no means to defend it, and so the validity of the debt was never discussed until the proceedings before Boyd, J.

Proofs in an arrangement are in the same position as proofs in a bankruptcy. An arrangement coupled with a vesting of the

carried. On the face of the memorandum of the Chief Clerk, admitting the debt, the following appears:—"The Official Assignee reserves his right to object to the debts now admitted after the second sitting." This debt having been so admitted without opposition, Mr Vagg duly supported the debtor's proposal, and the record shows that had Mr. Vagg not so voted on the second sitting, held on the 23rd July, 1895, the debtor could not have carried his proposal, and bankruptcy would have been the result.

When the second sitting was so carried, no other facts relating to this claim were before me except those disclosed on the statement of affairs and on Mr. Vagg's affidavit of debt.

After the second sitting was carried, and the estate became vested in the Official Assignee, he proceeded to investigate the facts connected with the several claims against the estate. There was necessarily great difficulty and delay in so doing. Numerous other claims were also disputed by the Assignee and brought before the Court for adjudication. The first audit came before the Court on the 2nd April, 1897, and a dividend of 8*s.* in the £ was ordered to be paid to the creditors then appearing to have proved and been admitted. Subsequently the Official Assignee was enabled to obtain letters and other information sufficient to justify him in applying to me, grounding his application on an affidavit, for a stay upon any further dividend to the said Mr. Vagg, and accordingly, on the 4th March, 1898, I ordered that payment of dividend on debt of E. H. Vagg be stayed until further order.

A judgment had been obtained by Mr. Vagg in the Queen's Bench Division in England, on the 11th January, 1895, for £1050, with costs, amounting altogether to £1141 14*s.* 10*d.*

estate has all the advantage of a bankruptcy, while the debtor is saved from a forced realization. The debtor here had only a life estate, and a sale of the life estate would have been destructive, whereas the creditors will be paid in full under the present proceeding. Vagg might be entitled to sue on a *quantum meruit*, but he is not entitled on the facts proved to the full commission: *Fisher* v. *Drewett* (1); *Green* v. *Lucas* (2).

The judgment of the Court of Appeal was delivered by

HOLMES, L. J.:— Feb. 25.

No Court in this country has jurisdiction to set aside a judgment of the English High Court of Justice; and as long as the judgment obtained by Edwin Vagg remains of record there, the defendant is estopped from denying that he owes the amount

Witnesses were summoned before me in reference to how this judgment was obtained, and it appeared that upon the hearing of the case before the Court the debtor was not regularly or in reality represented, nor were the facts of the case disclosed to the Court. I accordingly had several witnesses examined before me, and investigated the entire matter, and have arrived at the conclusion expressed in the first part of this judgment.

It has been argued before me that I have no right to go behind the aforesaid judgment of the English Court, inasmuch as the benefit to be derived therefrom was in the interest of the debtor and not of creditors. I do not agree with this contention. It is my duty to see that the *bona fide* creditors shall be paid their debts without avoidable delay, and the more especially as the debtor has only a life interest in the property. So hazardous is the security for the payment of the debts that the creditors have agreed to pay out of the funds applicable to the payment of their debts the premiums on policies of assurance on the life of the debtor, thus delaying the discharge of their claims. Had this case been in bankruptcy the creditors would have been entitled to claim interest on their debts, but they cannot get interest in this arrangement owing to the terms of the resolution.

On the foregoing grounds I have come to the conclusion that the debt of Mr. Vagg admitted on the 10th June, 1895, be expunged, and that Edwin Henry Vagg do pay to the trustee the costs properly and necessarily incurred by him in reference to this motion.

W. G.

(1) 48 L. J. (N. S.) C. L. 32. (2) 33 L. T. (N. S.) 584.

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recovered, save by showing that the debt thereby created has been subsequently satisfied or discharged. It does not, however, conclude the creditors of the defendant, and if the judgment debtor becomes bankrupt, the Court exercising bankruptcy jurisdiction is entitled, in the interest of other creditors, to investigate whether the judgment represents a real debt or liability. If the assignees can satisfy the Court that there is no consideration to support it, the judgment creditor will not be allowed to share in the dividend, and as the effect of a certificate of conformity is to release the bankrupt from all debts provable under the bankruptcy, the practical result is to relieve him altogether from the obligation.

The defendant in the present case has not been adjudicated a bankrupt; but he presented a petition under the arrangement sections of the Bankruptcy Acts, and in due time carried an arrangement which, amongst other things, provided that Mr. M'Entire, one of the official assignees, should be appointed receiver and manager over the petitioner's estate; and that after defraying outgoings, paying the interest on incumbrances, keeping up certain policies of assurance, and providing such reasonable maintenance for the petitioner as the Court might sanction, the receiver should apply the surplus income in payment by rateable distribution of such of the unsecured debts of the petitioner and so much of the secured debts as might not be covered by security, as should be respectively proved or admitted according to the course of the Court, until the same be fully discharged. In an arrangement matter of this kind the Court has precisely the same jurisdiction to investigate the claims of alleged creditors as it exercises in a case of bankruptcy; and an admitted creditor would have the same right as the assignees of a bankrupt to dispute a judgment debt on the ground that there was no consideration for it, subject to the condition that he is not too late in taking action. I do not think that this proposition has been contested; but it has been argued, that Mr. M'Entire is acting solely in the interest of the arranging debtor, and that for this reason, as well as by reason of his delay in moving, he ought not to be allowed to interfere.

The following are the facts:—The petition for arrangement was presented in January, 1895, on the day following that on

which the judgment was obtained in England, and the petitioner in his statement of liabilities included the judgment, adding however a note that he had received no consideration for it, and that he disputed the debt. At the instance of the petitioner, an order was made on the 24th May, 1895, directing a special sitting for proof of debts, which was held before the Chief Clerk, on the following 10th June. On this occasion debts to the amount of £1852, including £1141, the amount of Vagg's judgment, were proved, subject to a reservation of the right of the Official Assignee to object after the second sitting to the debts then admitted. The proposed arrangement having been assented to by the prescribed proportion in number and value of the creditors at the first and second private sittings held on the 28th June and 23rd July respectively, was afterwards confirmed by the Court without any objection by the Official Assignee. So far from objecting, he afterwards informed Vagg, that the debt was admitted; and it shared in the first dividend of 8*s.* in the pound, declared on the 2nd April, 1897, although long previous to that time there had been an examination before the Judge of the arranging debtor and other witnesses, relative to the former's efforts to raise money in London, and Mr. M'Entire had ample opportunity of making himself acquainted with the circumstances that led to Vagg's judgment. His first step towards disputing it, as far as I can discover, was an affidavit made by him on the 1st March, 1898, at which date a second dividend had been, or was about to be declared. His statements therein are extremely vague and general; and it appears from it that the facts relied on had come to the knowledge of the deponent on the 8th December, 1896, if not before. But, if Mr. M'Entire had been somewhat slow to move, the result of his action was summary and rapid. On the 4th March the Judge directed, without any previous notice to Vagg, that payment of the dividend on his debt should be stayed till further order. Nothing more appears to have been done until Vagg applied on the 12th May to remove the stay. This drew from Mr. M'Entire a cross notice of the 7th June to expunge the debt, which had been proved just three years before, and the order appealed from was made on these applications after full investigation and discussion.

In these circumstances, it is argued on behalf of Vagg, that

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the receiver has moved too late, and that the long delay as well as the present state of the matter shows that he is acting in the interest of the debtor, rather than of the creditors. It is said that the latter have been already paid 10*s.* in the pound, that they are certain to receive the rest at an early date, and that it is not alleged that any of them have pressed for quicker payment, or objected to Vagg sharing in the dividends. It is, no doubt, difficult to reconcile Mr. M'Entire's new-born zeal with his permitting Vagg to receive £450, long after he knew, or ought to have known, the doubtful character of the judgment, and with his having obtained an order at the time of the payment of the first dividend that the petitioner's allowance should be increased from £12 to £15 a-week. But it is not my duty to speculate on motives. I confine myself to facts, and as there is no doubt that if Vagg's debt is expunged, the other creditors will be paid more quickly, I must assume that the receiver's application is in their interest.

The long delay is another matter. There is a remarkable case, *Ex parte Weil* (1), which was not referred to in the argument. In it, an objection to the proof of a creditor who had voted at the first meeting of creditors on a composition resolution, was taken at the second meeting. The Registrar and Chief Judge held it was late, but, on appeal, it was decided to be in time, and James, L.J. says that it might even be taken up to the application for registration, which in Ireland, would mean confirmation. This shows that the Court had never heard of such an objection being made at a later date. What it would have thought of such an application, nearly four years after registration, may be inferred. Indeed it occurred to me, in reading the documents, that what was contemplated by the note of the Chief Clerk in the order of the 10th June, was that the right to object, which was reserved until after the second sitting, was to be exercised before confirmation.

It is, however, unnecessary for me to consider this point further, as I decide the case on a much more serious objection, which will be better understood by a few words of preliminary explanation.

The effect of the arrangement provisions of the Bankruptcy

(1) 5 Ch. Div. 345.

Acts is to enable the arranging debtor to make a proposal by way of compromise to his creditors which some of them may be obliged to accept against their own wish and protest. Such strong legislation is naturally accompanied by safeguards, the most important of which is that the proposal can only become effective if supported by a preponderance of opinion on the part of the creditors themselves. The greatest care is taken to ensure a deliberate and decided expression of such opinion. For this purpose it is provided that the arranging debtor must file in Court a full account of his debts and the names of his creditors. Notice must be given to them of two meetings, called the first and second private sittings, for the purpose of taking the proposal into consideration; and at each of these sittings, as well as on other occasions, if the Court thinks fit, they have an opportunity of proving their debts. At the first sitting the petitioner must attend and verify the account filed by him, on which he may then be examined; and the creditors are asked to assent to the proposal. Every creditor who has proved his debt may vote in person or may appoint by a signed authority a person to vote on his behalf. If three-fifths in number and value of the creditors who have proved debts to the amount of £10 assent to either the proposal or a modification thereof, the Court appoints a second sitting for the confirmation of what has been then adopted; and I believe the practice is to set out in a schedule to the order made up on the first sitting the names of the creditors voting for and against the proposal, and the amount of their respective debts. Due notice must be given of the second sitting to every creditor who was not present in person or by his appointed agent at the first; and the proposal previously assented to is again taken into consideration, when if three-fifths in number and value of those who have proved debts to the amount of £10 agree to accept it, the terms thereof are reduced into writing, and the creditors assenting sign the same. Thereupon the Court is authorised but not bound to confirm what is thus agreed to; and any creditor is entitled to be heard for or against it. If the Court confirms it, the agreement signed by the creditors is filed, and entered of record; and thenceforth is binding against all persons who were creditors at the date of the petition and who had notice of the

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several sittings. These provisions make it clear that the foundation of the arrangement is the agreement of the prescribed majority of creditors. Until an agreement is arrived at in the manner directed, the Court has no jurisdiction in relation to the proposal; and when the action of the creditors gives it jurisdiction it cannot alter a word of the agreement, but must confine itself to giving or withholding its confirmation. In this respect an arrangement resembles a general scheme of settlement of the affairs of a bankrupt under the trustee clauses of the Act of 1872. Such a scheme must be sanctioned by a special resolution of the creditors and assented to by the trustee, and is subject to the approval of the Court. We held a few days ago in *Stewart's Case* (1) that the Court has no jurisdiction to entertain or consider the scheme until the specified sanction and assent had been given; and that decision is equally applicable to an arrangement.

In the present case the provisions to which I have referred were, I have no doubt, carefully attended to. I do not know what happened at the first sitting, as I have not been supplied with the record of it; but the agreement signed by the creditors, at the second sitting—the document which is the only legal record of the arrangement—is now before the Court; and I find that it is signed by seventeen creditors, including Vagg, the aggregate of whose debts amounts to in or about £1623. If Vagg's debt be deducted, there remain £482 in all. I do not know the number and value of the debts proved at the date of the agreement. The amount of debts on which the first dividend was paid was £8805, but this must include many which were proved after the second sitting, and I have no doubt that £1623 represented three-fifths in value of the debts proved at that time. It is, however, certain that £482 would not have approached the required proportion. Previous to the signing of the agreement there were at the least three occasions on which debts were provable, and on the first of them I find that ten persons who did not sign, proved debts amounting in the aggregate to £682. Therefore, if Vagg's debt is expunged, no arrangement has been carried, and the agreement, by virtue of which Mr. M'Entire is entitled to represent the creditors and

(1) Not reported (Court of Appeal, 16th Feb., 1899).

apply to the Court, disappears. Mr. Justice Boyd says in the course of his judgment that if Mr. Vagg had not voted at the second sitting held on the 23rd July, 1895, the debtor could not have carried his proposal; but the only comment he makes thereon is that bankruptcy would have been the result. I have no means of knowing whether it would or not. The sitting might have been adjourned by order of the Court, and more votes might have been procured; or the petitioner, whose means seem to have been ample to discharge his then liabilities, might have obtained money to pay his creditors in full. Even if he had been adjudicated a bankrupt, there would have been no difficulty, as his life was insurable, in selling his life-estate in the property, and the creditors would probably have been paid 20*s.* in the pound three years ago. But we are not concerned with what might have happened. It is only what would not have happened that is material, and it is certain that the proposal would not have been carried on the day in question without Vagg's vote.

Serjeant Dodd, in opening the appeal, relied on this as an answer to Mr. M'Entire's application. He contended that without Vagg's debt, that gentleman would never have been appointed receiver; and that he could not be allowed to reprobate a matter, the approbation of which is a necessary condition to his *status*. Mr. Ronan, on the other hand, would not allow himself to be diverted from what he called the merits; and in this he showed, as usual, the instinct of an accomplished advocate. He sat down without replying to this part of his opponent's argument, and I have been unable to find an answer to it. Let me test its value by suggesting a case which is not improbable. Vagg's debt is expunged pursuant to the order of Mr. Justice Boyd, and a creditor who never agreed to accept the arrangement, and who does not understand why his debt should be unsatisfied while the petitioner is living in luxury on the £780 a-year paid to him under the terms of the arrangement, brings an action for the money due. What defence is there to it? By the terms of the statute, what binds the creditor and protects the debtor is not an order of the Court, but the signed agreement, filed and entered of record, a certificate of which is granted to the petitioner. It is produced with Vagg's name expunged, and a comparison

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with the proof of debts, shows it to be valueless. It seems to me that the creditor would thereupon be entitled to judgment as of course. But if the agreement would, by reason of the order made on Mr. M'Entire's application, be made valueless for one purpose, it must be valueless for all, including the purpose of making Mr. M'Entire receiver and trustee. A man sitting on the arm of a tree does not remain suspended in mid-air, if he severs the branch from the trunk. He comes to the ground along with his support.

No authority in point has been referred to; and probably the present is a case of first impression. There are, however, many decisions showing how closely the proceedings will be scrutinized for the purpose of ascertaining that the resolution has been carried in the manner and by the proportion of creditors prescribed by the statute. For example, in *Ex parte Kibble* (1), at an adjourned first meeting, and at the second meeting, the resolution had been duly carried, and the Chief Judge upheld it. On appeal, however, the whole proceedings were set aside on the ground that although the motion for the adjournment of the first meeting had been carried, reduced to writing, and signed by a large majority of creditors, this was only done after it had been ascertained that the prescribed three-fourths in value would not support the offer of composition, and that therefore the adjournment was invalid, and that it was not competent for any one again to propose that the composition should be accepted. In Ireland the Court has power to adjourn a sitting; but otherwise there is the closest analogy between the proceedings in the two countries.

I might refer to other cases, but it is not necessary, as the provisions of the statute are decisive in themselves. We hold therefore that Mr. M'Entire is not at liberty to apply to expunge a debt without which the proposal appointing him trustee could not have been carried, and the disappearance of which would nullify the arrangement that has been acted on for years. Having come to this conclusion, there is no need to consider whether there was any consideration for the judgment debt. It would be affectation to say that we have not formed an opinion, more or less definite, on a matter that has been so fully discussed; but after deciding that

(1) L. R. 10 Ch. App. 373.

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Mr. M'Entire was not entitled to raise the question, it would be somewhat inconsistent to proceed to deal with it. Accordingly the appeal must be allowed, the order of Mr. Justice Boyd reversed, and the application of Mr. Vagg to remove the stay placed on the payment of his dividends granted.

We are of opinion that the creditors have been fortunate in securing the services of Mr. M'Entire as their trustee. He has managed the property prudently and beneficially for all concerned. I have said that his action in reference to this judgment debt was taken in the interest of the creditors; and the petitioner has no reason to complain of it. A trustee ought to be indemnified by the trust estate against expenses incurred by him in good faith in carrying out the trusts; and, therefore, although he must be ordered to pay the costs of Mr. Vagg both in the proceedings before Mr. Justice Boyd and of this appeal, we direct that he shall be entitled to be recouped the costs so paid, as well as his own, out of the trust property as part of the costs in the arrangement matter.

Solicitor for the appellant: *T. H. Enright.*
Solicitors for the respondent: *Scallan & Co.*

R. D. M.

THE QUEEN (EARL OF GOSFORD) *v.* THE IRISH LAND COMMISSION (1).

Appeal. 1898. Feb. 3, 4, 9, 10, 12.

Landlord and tenant—Land Law (Ireland) Acts, 1881-1896—*Land Commission — Jurisdiction — Fair rent — Power to refer to Court valuers—Report—Order whether bad on its face*—Certiorari—Mandamus.

R. and S., two tenants on the estate of Lord G., having had fair rents fixed by a Sub-Commission, the landlord applied to the Land Commission for a rehearing. Before the cases were reheard, the Land Commission sent down two

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valuers to inspect the holdings and report. The direction to the Court valuers instructed them to visit the holdings, and if they concurred with the schedule recorded by the Court, and their conclusion as to fair rents, report so on a form supplied; if they saw reason to differ substantially therefrom they were to report on another form, stating concisely, under the respective headings, the matters only as to which they differed and the consequent variations upon which their estimate of the fair rent of the holding had been arrived at. The Court valuers reported, concurring with the schedule of the Sub-Commission. The appeals were heard by the Land Commission who received the evidence offered by landlord and tenants; but the Commission inspected and used the report of the Court valuers; and, in the result, confirmed the rents fixed by the Sub-Commission.

Held, that the Land Commission acted within their powers in making such reference to the Court valuers, and using their report.

The Land Commission made and filed a schedule prescribed by sect. 1 of the Land Law Act, 1896, in the form prescribed by the rules of January, 1897, Form No. 39, in which there was a statement under the heading of "Improvements made by the tenant" of deductions, with the sums allowed, for "Fences" and "Buildings" respectively, without further particularising these improvements; and a statement that the holding was subject to the Ulster Tenant-right Custom, but that no special deduction had been made when fixing a fair rent on account thereof:—

Held, that the order of the Land Commission was good on its face as sufficiently complying with sect. 1 of the Land Law Act, 1896.

APPEAL by the Earl of Gosford from an order of the Queen's Bench Division refusing to make absolute conditional orders for writs of *certiorari* to remove into that Court for the purpose of being quashed the orders made by the Land Commission on the 31st May, 1897, on the rehearing of the cases of Lord Gosford as landlord and William Rooney and Robert Shepherd as tenants, and for a *mandamus* to compel the Land Commission to hear and determine the said applications according to law. It appeared that several tenants on Lord Gosford's estate in the county of Armagh applied to the Land Commission to fix a second term of fair rents. In Rooney's case the tenant's former rent was £41 10*s.* which was reduced to £31 5*s.* by order of the Sub-Commission dated the 19th December, 1896. In the schedule filed in pursuance of section 1 of the Land Law Act, 1896, the Sub-Commission set out at No. 7 as

improvements on the holding made wholly or partly by the tenant or at his cost :—

	Capital Value.	Increased Letting Value due thereto.	Deduction from rent on account of each such improvement.
	£ s. d.	£ s. d.	£ s. d.
Fences, ...	72 0 0	3 12 0	3 12 0
Buildings, . . .	350 0 0	17 10 0	17 10 0
Removing Boulder Stones over Farm.	30 0 0	1 10 0	1 10 0
422 perches of Drains. .	28 2 8	1 8 1	1 8 1
50 perches of Drains, .	3 6 8	0 3 4	0 3 4

Total deduction for Improvements, . £24 3*s.* 5*d.*

They also stated in the schedule as follows :—

8. State any other matters in relation to the holding that have been taken into account in fixing the fair rent. — This holding is subject to the Ulster Tenant-right Custom, but no special deduction has been made when fixing a fair rent on account thereof.

The landlord and the tenants each applied for a rehearing before the Land Commission, and before the case came on to be heard, the Land Commission referred the schedule and order of the Sub-Commission to J. F. Bomford and T. M'Afee, two assistant Commissioners appointed by the Lord Lieutenant in pursuance of section 43 of the Land Law Act, 1881, to report thereon to the Land Commisssion. There was no order of the Land Commission directing the two valuers to make a report, but a form of directions was sent to them which stated :—"An appeal having been lodged in this case, you are to visit the holding; and 1, if you concur with the schedule recorded by the Court, and their conclusion as to fair rent, report so on Form A at foot of this page; 2, if you see reason to differ substantially therefrom, report on Form B within, stating concisely, under the respective headings the matter only as to which you differ, and the consequent variations upon which your estimate of

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the fair rent of the holding has been arrived at." Messrs. Bomford and M'Afee had previously acted as members of various Sub-Commissions in the county of Armagh. They visited and inspected the holdings, and reported that they concurred with the Sub-Commission. When the cases came on to be heard before the Land Commission, the solicitor for the landlord requested the Court that in considering the cases they should not take into consideration as evidence the order and schedule of the Sub-Commission or the Court valuers' report. The Court stated that they had already decided that these documents were evidence. The landlord's solicitor then asked them to state a case for the decision of the Court of Appeal of four questions which were formulated in writing, or in the alternative for leave to appeal:—

On the 31st May, 1897, Bewley, J., delivered judgment, refusing to state a case, and refusing leave to appeal, and confirming the rents fixed by the Sub-Commission in Rooney's case and Shepherd's case.

On a subsequent day conditional orders were made by the Queen's Bench Division on the application of Lord Gosford, for writs of *certiorari* to bring up and quash these orders on the following grounds:—

1. That the order in the premises was made without and in excess of jurisdiction.

2. That the Land Commission upon the rehearing acted upon evidence not given upon oath or in open Court or in the presence of the parties.

3. That the said Land Commission prior to the said rehearing referred the subject-matter for their decision upon said rehearing to certain persons for a report to the said Land Commission, which report was afterwards used as evidence upon said rehearing. That the said subject-matter of their decision was not a matter that had arisen before the said Land Commission in determining any question relating to the holding, nor were said persons "an independent valuer."

4. That the matters referred to said persons include matters of law and other matters which the Land Commission were not authorised to refer to them.

5. That there was no rehearing as required by law.

6. That the said Land Commission received and acted upon the report as evidence upon the said rehearing without same being verified upon oath in open Court and in presence of the parties.

7. That the said order is bad upon the face of it, as it purports to be an affirmance on appeal, and not an independent order of the said Commission, ascertaining and determining the fair rent of the said holding upon said rehearing.

8. That the said Land Commission upon said rehearing neglected to ascertain and record in the form of a schedule the matters and things prescribed by the Land Law Act, 1896, section 1.

9. That in purporting to ascertain and record in a schedule the said matters and things the Land Commission upon rehearing received and acted upon evidence not given upon oath or in open Court or in the presence of the parties.

The conditional orders each included a *mandamus* requiring the Land Commission to hear the cases.

Mr. Seaver, one of the registrars of the Land Commission, made an affidavit to resist the motion in the Queen's Bench Division to make the conditional orders absolute. The material parts of this affidavit are as follows:—

"The hearing and decision of the said cases respectively, were, pursuant to the provisions of the Land Law (Ireland) Act, 1881, duly delegated to a Sub-Commission, who duly adjudicated upon the same in the ordinary and regular course, and pursuant to the 1st section of the Land Law (Ireland) Act, 1896, duly recorded in each case a schedule of the particulars of each holding, showing (amongst others) the acreable rents of each class of land upon the holdings and the particulars of and deductions for each improvement made by each tenant upon each holding."

He then gave an account of the subsequent steps in the matter, and stated:—

"It is the practice in the Land Commission Court to issue to any of the parties who apply for the same, before a rehearing, copies of the schedules returned by the Sub-Commissioners, and also copies of the Court valuers' report, on payment of a fee of one shilling for each; and, in these cases, same were duly supplied to the landlord's solicitors. Before the cases came on for rehearing, the Land Commission directed two of the most experienced agricultural experts attached to the Land Commission—namely, Mr. John F. Bomford and Thomas M'Afee—to inspect and value the said holdings, and to report upon same, and upon the correctness, or otherwise, of the particulars of

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same recorded, as aforesaid, by the Sub-Commission, the accuracy of which had been impugned, as aforesaid, by the said notice of rehearing. The said Mr. J. F. Bomford and Mr. T. M'Afee accordingly inspected each holding, and valued the same, and reported to the Land Commission that, after carefully examining each holding, they concurred with the fair rent fixed by the Sub-Commission and with the schedule of the particulars recorded by them.

"In directing the said J. F. Bomford and Thomas M'Afee to inspect and value each holding, and to report upon the particulars of same before the rehearing of the cases, the Land Commission acted in pursuance of the provisions of section 48, sub-sect. 4, of the Land Law (Ireland) Act, 1881, and in accordance with the usual and settled practice of the Land Commission since the year 1881. From time to time, since 1881, very many rehearings of fair rent cases upon the estate of Lord Gosford have been disposed of by the Land Commission, and the aforesaid practice of sending independent valuers to inspect and value the holdings, and to report upon all the particulars of same before the rehearing of the cases, has been usually followed by the Land Commission. So far as I am aware, no objection to this practice was ever made by or on behalf of Lord Gosford until about a year ago, when his present land agent was appointed."

Further on, in paragraph 12 of the affidavit, Mr. Seaver said:—

"At the rehearing of the said cases, evidence was produced on both sides, and the Land Commissioners heard all the evidence offered on behalf of the landlord and tenants. In the case of Robert Shepherd the rent fixed by the Sub-Commission was £36; the fair rent estimated by Mr. William George Millar, who was produced on behalf of the tenant, was £26 2*s.* 3*d.*, and the fair rent, estimated by Mr. Richard Allen, who was produced on behalf of the landlord, was £42 3*s.* In the case of William Rooney the rent fixed by the Sub-Commission was £31 5*s.*, the fair rent estimated by the said William George Millar on behalf of the tenant was £22 8*s.* 6*d.*, and the fair rent estimated by the said Richard Allen on behalf of the landlord was £34 9*s.* The existence of the Ulster Tenant-rent Custom on Lord Gosford's estate was admitted at the rehearing. I am informed by the Land Commissioners, and believe that they duly considered all the evidence produced on both sides, and also the reports by the said John F. Bomford and Thomas M'Afee, and that, upon a full consideration of the said matters, and having regard to the evidence so given in Court, they came to the conclusion that the matters stated in the said schedules were in point of fact accurate; that the acreable rent therein stated as applicable to the various classes of land was fair and reasonable; and that the amount at which the tenant's improvements were valued was fair and reasonable; and that the deductions made for improvements, save as varied by them, were just and proper deductions, and not too high on the one part, and not insufficient on the other part. Having come to the said conclusion, they agreed with and adopted as a result of the rehearing the amount of the fair rent which had been already arrived at as a fair rent by

the Sub-Commission; and the schedules were thereupon prepared, in accordance with the statute, and the conclusion at which the Court arrived, to remain as a record of the matters therein stated.

"I am informed by the Land Commissioners, and believe that neither in the cases of the said tenants, Robert Shepherd and William Rooney, did they refer, nor in any other fair rent cases have they ever referred, to the Appeal valuers, the determination of any question of law or of mixed law and fact, or acted upon any statement in a report of Appeal valuers which might involve the decision of any question of law. What they have done is to direct the valuers to make a detailed valuation of the holding for the purposes of the report, and to ascertain whether the improvements had been in fact made, and if made what would be a reasonable allowance to be made in respect of them, and on this basis to report, for the information of the Court and convenience of the parties, their opinion as to what would be the amount of the fair rent; but they never referred to them the question whether the tenant was entitled in point of law to any reduction in respect of improvements. Save where the improvements are admitted to have been made by the tenant, or where some presumption exists that they have been made by him, the Land Commissioners on the rehearing of cases require, and in the cases of Shepherd and Rooney did require and had before them, evidence (on rehearing) of the making of any improvement allowed, entirely irrespective of any statement as to the improvements in the reports of the Appeal valuers; and the Court fixed the fair rent upon the full investigation of the case, including the evidence given before them, and having regard to the report of the valuers on questions of fact and value as the report of an experienced and independent person who had inspected the holding."

The Queen's Bench Division (Sir P. O'Brien, L. C. J., Palles, C.B., and O'Brien and Johnson, JJ.) (1) having refused to make absolute the conditional orders, Lord Gosford appealed.

Ronan, Q.C., *Campbell*, Q.C., and *C. Murphy*, for the appellant:—

The Land Commission acted without, and in excess of, jurisdiction, by their delegation to the valuers, inasmuch as the section of the Act of 1881 contemplates a reference to a single valuer on a question arising in the course of the case, and not an antecedent reference to two valuers of all questions to be determined. The order of the Land Commission being based, as it was, on the report of the valuers, was made without jurisdiction.

The facts show that the order was not made by the Court, but that they referred the whole question to the valuers. They cannot delegate their authority, except so far as

(1) 32 Ir. L. T. Rep. 27.

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expressly authorised by statute, and the evidence must be taken by the Court itself upon oath. We submit, (*a*) they cannot refer a question of law to the valuers; (*b*) they cannot ask them what is the meaning of fair rent, because they must first tell them the standard, and as the members of the Land Commission differ, *inter se*, as to what that is, there is no standard: *Markey* v. *Lord Gosford* (1); (*c*) The valuers cannot administer an oath, and have no power to take evidence. The powers and duties of assessors or valuers have been defined: *Re Dawdy* (2); *Longman* v. *East* (3). A Court acting with an assessor is a different tribunal from a Court acting alone: 4 Inst. 70, 199. The matters referred to the valuers were partly questions of law and partly questions of fact; for example, the deductions to be made in consequence of each improvement: *Adams* v. *Dunseath* (4). The question of fair rent involves three things: (*a*) What is a fair rent? (*b*) Is there an allowance to be made for occupation interest outside Ulster; and (*c*) assuming that there is to be an occupation interest, what allowance is to be made if the holding is subject to the Ulster Custom? The reference to the Court valuers being illegal and in excess of jurisdiction, there is power to quash, notwithstanding that *certiorari* is taken away: Paley on Convictions, 354.

Secondly, the order is bad on its face by reason of its failing to comply with the provisions of sect. 1 of the Act of 1896. That section enacts that no deductions shall be made, save those that are specified. The improvements must be stated so that they can be identified. Otherwise after another fifteen years the tenant may get credit for them again; merely stating "fences" and "buildings" is too indefinite. Then there is the statement that the holding is subject to the Ulster Custom, which must have been introduced as the basis of an unspecified deduction, again violating the Act, and therefore invalidating *ex facie* the orders complained of.

[The following cases were referred to:—*Overseers of Walsall* v. *L. & N. W. Railway Co.* (5); *Reg.* v. *Bolton* (6); *Re Listowel Fishery* (7);

(1) 31 I. L. T. R. 97.
(2) 15 Q. B. D. 426.
(3) 3 C. P. D. 142.
(4) 10 L. R. Ir. 109.
(5) 4 App. Cas. 30.
(6) 1 Q. B. 66.
(7) I. R. 9 C. L. 59.

Colonial Bank v. *Willan* (1); *Reg.* v. *Cheltenham Commissioners* (2). *In re Sullivan* (3); *In re Heaphy* (4); *Ex parte Hopwood* (5); *In re Bailey* (6); *Lord Rossmore's Case* (7).]

The Rt. Hon. The Mac Dermot, Q.C., Henry, Q.C., and *D. M'Carthy Mahony*, for the Irish Land Commission:—

The question is a narrow one. The appellants must show: 1, a want of jurisdiction; 2, that the order is bad on its face; or 3, that there was such a bias in the tribunal that the principle *non est judex* applies.

The first of these is not open to the appellant, because a fair rent had been fixed before between these parties by the Land Commission, and this is the second term. The second ground of objection is open; and three matters are suggested to support it: (*a*) that the particulars of the fences are not set out; (*b*) that the word "buildings" is not sufficient; and (*c*) the statement that the holding was subject to the Ulster Custom.

With respect to the "fences" and "buildings," it was always open to the landlord to give evidence as to the particulars of the fences and buildings; and the value of the fences is what was estimated by the landlord's valuer. The description "buildings" is sufficient: it is the same as would be given at a sale by auction. Nothing was taken off the rent for Ulster Tenant-right, and so that has not affected the question.

The reference to the valuers was made in pursuance of sect. 48; it has been constantly done, and if this makes the order bad, every fair rent fixed since 1881 is void. It is not a question of jurisdiction, but of misconduct. But the Land Commission did not use the report as the foundation of their judgment, but only as a legitimate element with other evidence in enabling them to come to a right conclusion.

[They referred to:—*Reg.* v. *Justices of Cambridgeshire* (8); *Reg.* v. *Justices of Carnarvonshire* (9); *Allcroft* v. *Bishop of London* (10); *Reg.* v. *Justices of West Yorkshire* (11).]

(1) L. R. 5 P. C. 417.
(2) 1 Q. B. 467.
(3) 22 L. R. Ir. 98.
(4) 22 L. R. Ir. 510.
(5) 15 Q. B. 121.
(6) 3 E. & B. 607.
(7) [1894] 2 I. R. 394.
(8) 1 Dow & Ry. 325.
(9) 4 B. & Ald. 86.
(10) [1891] A. C. 666.
(11) 10 A. & E. 685.

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LORD ASHBOURNE, C.:—

This appeal from the Queen's Bench Division raises some important questions in reference to the Land Commission; but although the arguments have necessarily been long, and involved the discussion of many interesting legal topics, some of which would be more pertinent on an appeal or case stated, the decision must turn upon a few clear and simple considerations.

The Land Commission is not in the technical sense a Superior Court; but it has jurisdiction to determine all questions of law and fact; its proceedings must be regarded as the judicial proceedings of a Court of Record; and in reference to it *certiorari* is taken away.

But notwithstanding that *certiorari* has been taken away, it is contended that that writ should issue in the present case on two grounds: first, because the order of the Land Commission is bad on its face; and second, because it is alleged there was an error in law in the action of the Land Commission in reference to the report of the valuers.

These points are quite distinct, and must be dealt with separately. The first turns upon what is called "The Pink Schedule," which is prescribed by the first section of the Irish Land Act of 1896. This Court in the case of *Cope* v. *Cunningham* (1) laid down, with absolute clearness, that the enactment applied to the Head Land Commission itself, as well as to the County Courts and Sub-Commissions; and that is not a position which it is for a moment sought to question. In that case, acting under their then impression as to the law, the Head Land Commission had omitted altogether to fill the Pink Schedule. They had no Pink Schedule at all; and we were all clearly of opinion that the enactment relating to that document plainly applied to them, and that it was their duty to comply with it. The present case, of course, differs entirely from *Cope* v. *Cunningham* (1). The order of the Land Commission is accompanied by a Pink Schedule; and the allegation of the appellant is that their order is bad on its face, in consequence of the way that schedule has been filled. The objections taken may be very shortly stated, and are two in number: first, it is alleged that "the nature and character" of two of the improvements, "Fences, £72; Buildings, £350," are

(1) [1897] 2 I. R. 467.

not adequately described. It is alleged that the length, situation, and character of the fences are not stated, and that the description of the buildings is not sufficiently full. I do not say at all that the description of fences and buildings might not be made more precise; but I am clearly of opinion that on this application we could not hold the objections well-founded. Second, it is urged that the schedule states under the heading of "such other matters in relation to the holding as may have been taken into account in fixing the fair rent thereof," that "the holding is subject to the Ulster Tenant-right Custom," but that no sum is stated to have been deducted in respect of it. If a deduction had in fact been made from what would otherwise have been the fair rent, on account of the Ulster Tenant-right Custom, it should naturally have been specified; but it may have been considered without any deduction being made. There are many usages comprised in the general description of "the Ulster Tenant-right Custom," and there is nothing in the schedule to compel us to infer that under the usage to which this holding was subject, taking it fully into consideration, there was anything to justify any deductions in addition to those already specifically stated. In my opinion, therefore, there is nothing to support the first objection that the order is bad on its face.

Holding then the order to be good on its face, it remains to consider the second objection, alleging error in reference to the valuers' report. Having regard to the power and jurisdiction of the Land Commission, mere mistakes in law on their part would not support this application. From the mass of cases showing this, it will suffice to refer to the case in the House of Lords of *The Overseers of the Poor of Walsall* v. *London and North-Western Railway Company* (1). But the powerful argument addressed to us by Mr. Ronan and Mr. Campbell, contended that the action of the Land Commission in reference to the valuers' report was no mere error of law. They assert that the Land Commission exceeded their jurisdiction in the wide reference they made to the valuers, that the valuers' report was therefore unauthorized, and that its consideration by the Land Commission was calculated to cause "a real bias" in their mind, and therefore destroyed their judicial competency.

(1) 4 App. Cas. 30.

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The express statutable power of the Land Commission to employ independent valuers to make a report to them is found in section 48, sub-sect. 4, of the Irish Land Law Act, 1881. That section authorizes the Land Commission, determining any question relating to a holding, to direct an independent valuer to report to them on any matter they may desire to refer to him, and if they think fit to adopt his report, and they have further authority to direct that the valuer should accompany his report with a statement of all such "facts or circumstances as may be required" to enable the Land Commission to form their judgment on the subject-matter of the report.

In the present case it is argued that there was no order of reference, and in any event no power to refer to more than one valuer. But the Land Commission followed in the present case the practice they had maintained since 1881; and it would be unreasonable now to allow this practice to be questioned when the valuers, set in motion by the machinery of the Land Commission, duly reported to the Land Commission. The two valuers started in their work by the Land Commission were asked to report—1, whether they concurred with the schedule recorded by the Sub-Commissioners, and also with "their conclusion as to the fair rent"; or 2, if they saw reason to differ substantially, then to report the matters as to which they differed, and the consequent variations in the fair rent. These being wide questions, involving practically the entire schedule of the Sub-Commissioners and their conclusion as to the fair rent, were referred to the valuers for their report. The report of the valuers was sent to each of the parties from the Land Commission, accompanied by a perfectly fair and proper letter saying that the Commission considered both parties should be informed of the result, and that it rested with the parties to prosecute, or withdraw, their notices for rehearing, and that they were not bound to accept the Court valuers' estimate of the rent. The report was considered and presumably acted on, and used by the Land Commission as they thought fit. The appellant contends that the action of the Land Commission in relation to this report involves such error as to vitiate their order—that they had no authority to make such a reference, or act on such a report. The argu-

ment shortly is, that asking for and using such a report gave them a "real bias," and took away their judicial independence and competency, and the judgment of Lord Blackburn in the case of *Reg.* v. *Rand* (1) and other authorities have been referred to in order to establish the contention. It is only fair, however, to bear in mind the explanation of their motives and action in reference to this report given on behalf of the Land Commission by their officer, Mr. Seaver. The following statements from his affidavit are entitled to notice :—"In directing the said J. F. Bomford and T. M'Afee to inspect and value each holding and to report upon the particulars of same before the rehearing of the cases, the Land Commission acted in pursuance of the provisions of section 48, sub-sect. 4, of the Land Law (Ireland) Act, 1881, and in accordance with the usual and settled practice of the Land Commission since the year 1881. . . . At the rehearing of the said cases evidence was produced on both sides, and the Land Commissioners heard all the evidence offered on behalf of the landlord and tenants. . . . I am informed by the Land Commissioners, and believe, that they duly considered all the evidence produced on both sides, and also the reports of the said J. F. Bomford and Thomas M'Afee, and that upon a full consideration of the said matters, and having regard to the evidence so given in Court, they came to the conclusion that the matters stated in the said schedule were in point of fact accurate, that the acreable rent therein stated as applicable to the various classes of land was fair and reasonable, and that the amount at which the tenants' improvements were valued was fair and reasonable, and that the deductions for improvements, save as varied by them, were just and proper deductions, and not too high on the one part, and not insufficient on the other part. Having come to the said conclusion, they agreed with and adopted, as a result of the rehearing, the amount of the fair rent, which had been already arrived at as a fair rent by the sub-Commission, and the schedules were thereupon prepared in accordance with the statute; and the conclusion at which the Court arrived remains as a record of the matters stated. I am informed by the Land Commissioners

(1) L. R. 1 Q. B. 230.

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and believe that neither in the cases of the said tenants, Robert Shepherd and William Rooney, did they refer, nor in any other fair rent case have they ever referred, to the Appeal valuers the determination of any question of law, or of mixed law and fact, or acted upon any statement in a report of Appeal valuers, which might involve the decision of any question of law. What they have done is to direct the valuers to make a detailed valuation of the holding for the purposes of the report and to ascertain whether the improvements had been made in fact, and, if made, what would be a reasonable allowance to be made in respect of them, and on this basis to report, for the information of the Court and convenience of the parties, their opinion as to what would be the amount of the fair rent: but they never referred to them the question whether the tenant was entitled in point of law to any deduction in respect of improvements."

This affidavit, carefully framed and deliberately put forward by the Land Commission, states what they intended in asking for a report, and what they did on the report; and its whole structure conveys that their order was their own independent judicial act, quite free from the vice of "real bias" imputed by the appellant. I am by no means prepared to concur in the assumption that the reference was unauthorised when rightly understood. The sub-section (4) of section 48 is extremely wide, as to the matters, facts, and circumstances, which the Land Commission can refer to a valuer, and if the word "valuer" is taken as the key, then the reference only asks for such report as a valuer could make in reference to the matters referred. He is not asked to report on any matters of law connected with the schedule or with the fair rent; but there is ample scope for a perfectly legitimate report from him as a valuer on the facts.

But even assuming that the reference to the valuers was too wide, not sufficiently guarded in its terms, and that more care might have been taken to direct them not to wander into disputable regions of mixed questions of law and fact, would that carry the contention of the appellant? The Land Commission, as I have already said, is a Court of Record, with full jurisdiction to determine all questions of law and fact, with the writ of *certiorari* taken away, and if in the *bona fide* exercise of their powers

they make a mistake in the extent and terms of a reference, they are expressly authorised by statute to make, that is then a mistake in law, which any tribunal might honestly make, and cannot be reached by *certiorari*. If a report, open to objection by reason of its undue width, was sent in to the Land Commission, I infer, from the affidavit of Mr. Seaver, that the Land Commissioners would feel bound to disregard anything in it which appeared to intrude into questions of law or mixed questions of law and fact, and exercise their own independent judgment in arriving at a conclusion, and framing their order. Here the Land Commission appears to have acted in the belief that they were, and with the intention that they would keep, within the statute; and I am clearly of opinion, for the reasons I have stated, that on this second ground relied on by the appellant no case whatever has been made for the writ of *certiorari* asked for, and that no jurisdiction to issue it has on the facts been shown.

It is unnecessary to add anything on the application for a *mandamus* to the Land Commission. Once the order already made is held to be good on its face, and that it cannot be quashed, it is manifest that the Land Commission could not be ordered to hear and determine, as if that order was not in existence.

In my opinion the order of the Queen's Bench was right and should be affirmed. We have carefully considered the question of costs, which has caused us some difficulty, but, considering that the effect of the appeal will be to settle the practice of a great department, we will allow the parties to bear their own costs.

FITZGIBBON, L.J.:—

I concur with the Lord Chancellor, and with the Court of Queen's Bench, that the cause shown against the conditional order for a *certiorari* and *mandamus* must be allowed. But although thus concurring in the conclusion of the Queen's Bench, the grounds upon which my judgment rests differ materially from those that appear in the judgments of the Court below; and, in its effect on the practice, and on the principles which ought to regulate the practice, of the Land Commission, the decision of this Court is so far different from that of the Court below as to justify the conclusion that the appeal has been useful in the settlement of

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those principles and that practice. There is also, in the judgment of my Lord Chief Baron, a hint at a very large question, which it is not necessary for us on the present occasion to decide, but upon which I entertain the gravest doubt that the language of his judgment could be adopted without introducing an innovation into the law, as regards the principles that govern the control of the Court of Queen's Bench over an inferior Court. As at present advised, I am obliged to guard myself entirely against basing anything upon any immunity, or supposed immunity, of the inferior Court from being controlled by *certiorari*, based on its being endowed, or supposed to be endowed, with power to enlarge its own jurisdiction by making a mistake in point of law, or by deciding that it has a jurisdiction which it really has not.

I propose to arrange the observations which I wish to make under two heads, because it appears to me that the questions at issue are reducible to two. First—Is there on the face of this order such a manifest want or excess of jurisdiction as to make it examinable and bad? Secondly—Has there been, in the course of the procedure, any conduct on the part of the Court, or any proceeding, indicating a want or excess of jurisdiction, capable of being shown *aliunde*, such as will enable us to say that the order is bad?

Upon the first question, it is remarkable, as observed by the Lord Chief Baron, that there is upon the face of the order itself no express incorporation of the schedule upon which the whole question turns, with the order fixing the fair rent. The Lord Chief Baron got over that difficulty, which was purely technical, by the signature of the Registrar at the bottom of the schedule, as that signature purported to be attached "by order of the Court." But, looking at the statute under which the schedule is framed, it appears to me that we may find a more satisfactory answer to the suggestion that, as regards incorporation, the order and the schedule taken together are objectionable in form. The subject-matter of the order of the Court is the fixing of a fair rent; to the process of fixing that fair rent the Act of 1896, sect. 1, has attached the obligation of ascertaining the fair rent in a certain way, and of afterwards recording it in a schedule. Subsect. 2 contains a curious provision that nothing contained in the

first schedule shall affect the construction of any other portion of the Act, but the first schedule gives a statutory form, which is headed, "Form of schedule for recording particulars of holding taken into consideration in fixing the judicial rent," and this statutory precedent identifies the schedule with the order in the very same way in which the schedule is identified with the order in the present case—namely, by referring to the county, to the record number, and to the names of the landlord and tenant, and by the identity of the date. Therefore, so far as the form of the paper is concerned, the order of the Land Commission fixing the fair rent, and accompanying the fixing of that fair rent by a schedule, purports to be a discharge of their duty under the Act of 1896, sect. 1, and is sufficient.

That being so, the first objection to the contents of the order is that, as to fences and buildings, it does not sufficiently detail the matters which the Act directs to be recorded. I concede to Mr. Ronan's argument that one object—if not the main object—of recording the particulars of the improvements that were made the subject-matter of deduction, or that were credited to the landlord, may have been to make the record available for future use as evidence. But upon his observations with respect to the effect upon the duty of the Land Commission under the statute of our decision in *Cope* v. *Cunningham* (1), I desire to say a few words. The Chief Baron, in his judgment in that case, says that he thinks it clear that the intention of the Legislature was that the Court should, before it determines, and as incidental to determining the fair rent, ascertain the particulars in section 1, and that the fair rent of the holding should be ascertained having regard to such particulars, which are essential ingredients in, and the basis of, the ascertainment of the fair rent. He then adds:—"It is impossible that there can be any difficulty in recording them, if the rent has been fixed in pursuance of the directions of the sub-section. The rent cannot be ascertained without each of these particulars being present to, and operating upon, the mind of the Court in ascertaining it, and, for this reason, I am of opinion that the omission of the schedule is not a mere irregularity, but that *it goes to the*

(1) [1897] 2 Ir. R. 467.

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jurisdiction of the Court to ascertain the fair rent of the holding." I stop there for a moment, though three lines are added upon which I wish afterwards to say a word. Upon that statement of the law by the Lord Chief Baron I venture to explain the considerations which seem to me to give vital importance to the Lord Chief Baron's opinion, which I also entertain, that compliance with the section is essential to the jurisdiction of the Land Commission to fix a fair rent at all. It appeared to me then, and it appears to me still, that the process of ascertaining the fair rent which is prescribed, is the process which is to be recorded in the schedule; the recording of it afterwards in the schedule is the prescribed mode of showing that it has been gone through, and unless the prescribed process has been gone through, and has been recorded as prescribed, it was the judgment of the Lord Chief Baron, and it was mine, and I don't understand it to be now questioned, that the Land Commission would not have satisfied its jurisdiction, and if it appeared on the face of its order that it had not done its prescribed duty the order would be bad. When the statute states that the process is to be recorded in the form of a schedule, it follows that unless it is recorded in the form of a schedule, it will appear that the rent has not been ascertained in the way directed, and therefore it will appear on the face of the order that the section has not been obeyed, and the order will be bad. But the Lord Chief Baron added these words:—"In my opinion an order purporting to fix a fair rent in a case in which *the required particulars are not recorded* in the schedule, is null and void, and made without jurisdiction." I believe that the Lord Chief Baron never intended to convey, and when I concurred with him I certainly did not understand him to convey, that a failure to record in the schedule all and every one of the required particulars would make the order null and void. What he was speaking of, and what I was thinking of, was a case in which there was no schedule at all, and in which there was, therefore, disobedience of the statute which directed that the schedule should be there, and in which the absence of the schedule showed, in the way I have already pointed out, that the rent had not been ascertained in the way directed by the statute, and therefore had been ascertained without jurisdiction. If we turn to the statute itself, the distinc-

tion will appear between the particulars which are to be set out in the schedule, and the process of ascertainment which, in its essentials and as a whole, the schedule must record as having taken place. There are a great many matters which are expressly directed to be considered by the Court in fixing a fair rent which will never appear in the schedule at all, in the shape of deductions. The first sum that is to be put down in the schedule is the annual sum which should be the fair rent, on the assumption that all the improvements—I will say for shortness—belonged to the landlord. Secondly, the condition as to cultivation, deterioration or otherwise, of the holding and the buildings thereof. This recording of the condition of the holding is a mere writing down of certain things which were there to be seen at the time, in order that, on a future occasion, one may be able to know, when revising the rent, what the condition of these temporary matters had been at some previous time when the rent was fixed, but that condition never can appear as an item in moneys numbered in the schedule, or in the prescribed calculation of the fair rent. Then follow the improvements belonging to the tenant, and a number of particulars regarding them are directed to be recorded, including "the nature, character, and present capital value thereof, and the increased value due thereto." Let me ask whether those general words, "nature, character, and present capital value," make it necessary to the jurisdiction, or compulsory, to identify every fence, building, and drain that has been taken into account? With all respect it appears to me that they certainly do not. Again—not interpreting the section by the schedule, but looking to the schedule as to a marginal note, as an indication of what the Legislature was about when drawing the section—I find, amongst other things, the question—"Does the holding require to be drained, and, if so, how much of the holding? and mark the part requiring drainage on map by thin parallel black lines." This schedule to the Act was afterwards modified, and the Land Commission framed another instead of it, as they had power to do, but I am entitled to refer to it to show that the words "nature and character of improvements," when used by the framers of the Act, did not carry with them any obligation or idea of identifying every fence and every drain which might appear upon the schedule to have been taken into account in

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fixing the rent. The Commissioners must purport to investigate these things, to find out their present value, to make what allowance they think right with regard to them, and when they have done all this, they must show that they have done so; but there is an entire difference, as it occurs to me, between showing by the absence of the schedule that they have not gone through the process which the Act directs, and, after having gone through the process, having merely failed to record every step and item in it with full particularity, or with the particularity which might be desirable, or even necessary, for the purpose of preserving evidence. I must emphatically disclaim for myself, and I have no reason to suppose that I am not justified in disclaiming for the Chief Baron's judgment also, any intention to invert the order of time so completely as was suggested in that part of Mr. Ronan's argument in which he cited our judgments to show that any appreciable defect in the schedule, however trivial, would nullify the order ascertaining the fair rent, although the schedule was not prepared until after the ascertainment of the rent, and only purported to record how the rent had been ascertained. It appears to me that it is only where the schedule shows on its face that the ascertainment was not such an ascertainment as the Act prescribes, or where the absence of a schedule shows that the statutory duty was not performed, that the schedule "would go to the jurisdiction," and make the order bad on the face of it.

The second objection that was made upon the face of this order, as to the "Ulster Custom," appears to me to be much more serious, because it charges the Land Commission with having violated an express provision of the statute. Sub-sect. 9 provides that in assessing the fair rent of any holding, no deduction shall be made except such deductions as shall be specified and accounted for in the schedule, and are in accordance with the provisions of the Land Law Acts. I do not refer to the difference between the schedule of the Sub-Commission and the schedule of the Head Commission, because we have now to decide whether the order of the Head Commission is bad upon its face, and we cannot make it better or worse by referring to another document. "State any other matters in relation to the holding that have been taken into account in fixing the fair rent thereof." Answer: "The holding

is subject to the Ulster Tenant-right Custom." It is strongly pressed, especially when we look at the form of the previous answer, from which this one varied, that this amounts to a statement that the Ulster Tenant-right Custom was taken into account for the purpose, and with the effect, of making a deduction from the fair rent. I believe that all the Judges of the Queen's Bench were of opinion, and so far as I know all the Judges here are of opinion, that if it appeared upon the face of this schedule that anything had been deducted in fixing the fair rent, which was not shown upon the schedule, the schedule would be bad, and that it would follow that the order, of which the schedule is an integral part, was bad also, upon the ground that it failed to comply with the express provision of sub-sect 9. But I cannot read these words "the holding is subject to the Ulster Tenant-right Custom" as necessarily intending any deduction from the fair rent. In the first place, if they could be divorced from the printed question, or if they were even "separated from it by a black line"—to use a quotation from the schedule itself—the observations would be not only harmless but legitimate, because from "the circumstances of the holding" which the Commissioners are bound to consider in fixing the fair rent, the fact that it is subject to the Ulster Tenant-right Custom cannot be excluded. It may have—it is not for me to say whether it has or not, but in the opinion of those who know more about it than I do, who know nothing, it may have—a direct and legal bearing upon the presumption as to improvements. It apparently is a circumstance of the holding which is to be considered, and may therefore be taken into account in fixing the fair rent. But my present point is this—the note here cannot make this order bad upon the face of it, unless the fact that the holding was subject to the Ulster Tenant-right Custom had led to a deduction being made, which deduction was not specified in the schedule. The portion of the section which is said to be violated is sub-section 9. But the answer is this—there are many matters in relation to the holding which are to be taken into account in the schedule, but which are not, or may not be, the subject of deduction. One of these I have already referred to—the condition as to cultivation, deterioration or otherwise. Another of them is—"(*e*) the improvements made wholly or partly by, or

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at the cost of, or acquired by, the landlord;" and we have also—"such other matters in relation to the holding as have been taken into account in fixing the fair rent thereof." Some of these matters may increase the letting value, and consequently the fair rent; others may not. I am not certain that it has not even been said that "fair rents" are higher in Ulster than elsewhere. It occurs to me therefore, that as the note does not necessarily lead to a deduction, we are not at liberty to assume that a deduction was made. Johnson, J., was very doubtful indeed—in fact so doubtful as almost to express an opinion to the contrary—that this order could be maintained in consequence of this note. But he truly says that, in dealing with such an order on *certiorari*, "no intendment can be made against it," and we do make an intendment against it, if we hold this note to intend and mean that the Ulster Tenant-right Custom was a matter in relation to the holding which was taken into account for the purpose of making a deduction. If this had been done, the deduction ought to have been shown, and the order would be bad because it is not shown; but, without intending against the order, I cannot assume that an unspecified deduction was made, and the order is therefore good upon the face of it.

It is most undesirable that we should go into the question, except so far as is absolutely necessary, of the definition of a fair rent. The first item in the schedule to be framed under the Act of 1896, s. 1, is "the annual sum which should be the *fair rent* of the holding, on the assumption that all improvements thereon were made or acquired by the landlord." In determining the sum which should be the fair rent of the holding upon that assumption, it appears clear that the Land Commission is still to exercise the same jurisdiction which was conferred upon it by the Act of 1881, s. 8, and that the sum which has been called "the gross fair rent" is still to be ascertained and determined by the Land Commission under the Act of 1896 as under the Act of 1881, by a similar process and in a similar manner, and that all that the Act of 1896 has done is to require that any deductions made from that sum shall be specified, and that certain of the materials used in ascertaining it shall be stated. Further light is thrown upon the intention of the Act of 1896 by referring to the Act of 1881, sect.

8, sub-sect. 9. "No rent shall be allowed or made payable in any proceedings under this Act in respect of improvements made by the tenant or his predecessors, and for which, in the opinion of the Court, the tenant shall not have been paid." The provisions of the Act of 1896, with regard to specifying improvements and the deductions allowed for them, appear to be to a great extent—I don't say entirely—pointed to identifying and recording any disallowances of rent that may have been made in respect of improvements which, under this sub-section of the former Act, would have been left unspecified.

We have been referred to the judgments in the case of *Markey* v. *Gosford* (1), and I have gone through them with great care, upon this question of fair rent. I desire to leave it in the same position in which the Act of Parliament placed it, by nowhere indicating any intention of defining a fair rent. But it appears impossible to say, for the reasons indicated by those judgments, that the fact that a holding is under the Ulster Custom necessarily involves a deduction from what would otherwise be ascertained as the fair rent. Furthermore, it appears to me that, if we read the judgments with care, it is impossible to understand the difference between Bewley, J., and the other members of the Commission, with regard to what they called "occupation interest," unless those other members, when they said that what was called "competition value" was to be excluded, and yet that the fair rent was to be ascertained upon the assumption that the land was in the landlord's hands, meant that it was to be taken as being in the landlord's hands for the purpose of working it as a holding, and not in the landlord's hands for the purpose of putting it up to competition, and so getting the "competition value" for it. They really seem to have desired to get, as it were, the intrinsic value as the foundation of the fair rent. If so, as is well pointed out in the Queen's Bench, especially in the judgment of O'Brien, J., we are not intending against the truth, when we do intend, upon the face of this order, and in its favour, that no deduction was made here from what would otherwise be the fair rent of this holding, on the ground that it was subject to the Ulster Custom. That

(1) 31 I. L. T. R. 97.

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being so, both in reality and in form, according to its fair intendment, we cannot hold the order to be bad.

The next question comes to one of jurisdiction, and two objections were made by Mr. Ronan, which were on narrower grounds, and which I shall deal with first. His first objection was that the power to refer under section 48, sub-section 4, being a judicial power, was a power to be exercised by a proper order, and that there was no order in this case. That it is a judicial power no one can doubt. "In determining any question relating to the holding, the Commission may direct an independent valuer to report his opinion on any matter the Commission may desire to refer to such valuer." There must be a desire to refer, and there must be a direction to refer, and there was nothing in the nature of an order made up in the particular case, referring anything to Messrs. Bomford and M'Afee. There is also no general order making such a reference in all cases, at least in the form in which that term is usually understood. But I am bound to say that I cannot adopt the view of the Lord Chief Baron as to how this reference came, in fact, to be made. What he says, is:—"All these questions, involving, as they do, many of the most difficult and as yet undetermined questions that have arisen upon the interpretation of this most difficult Act of Parliament, are *by the administrative act of some unknown clerk* referred to the consideration of two gentlemen, who, no doubt, are skilled valuers, but who do not pretend to have any legal knowledge." The mode in which this reference really took place is officially stated by Bewley, J., in the observations which he made on the 7th December last, reported 31 I.L.T., p. 575, when he was announcing a change in the practice, as to which I shall have to say a word before I am done. He said that this practice had been from the beginning. Before the rehearing in *Adams* v. *Dunseath* (1), the Court availing itself of the provisions of section 37, sub-section 6, or section 48, sub-sect 4, had the holding inspected by two valuers. On the 17th January, 1882, O'Hagan, J., in a judgment of great weight, in which Mr. Commissioner Litton concurred, held that the parties should have an opportunity of seeing the reports. It was then decided that the

(1) 10 L. R. Ir. 109.

report of the valuers should be given to the parties. While O'Hagan, J., was still Judicial Commissioner, and after some years, the form of the report of the Court valuer developed into a more elaborate document than it originally was, and information was asked on twelve different subject-matters relative to the ascertainment of the fair rent. That system went on for nine or ten years, and he said that it was impugned by the order of the Queen's Bench in this case. As to the "impugning" of it, I shall speak afterwards. I am now upon what it was before it was impugned, and what the reference was in the present case. In my opinion the paper handed to the valuers in this case indicates that it is itself in the nature of a judicial reference. "An appeal having been lodged in this case, you are to visit the holding; and (1.) If you concur with the schedule recorded by the Court, and their conclusion as to fair rent, report so on form A at foot of this page. (2.) If you see reason to differ substantially therefrom, report on Form B within, stating concisely, under the respective headings, the matter only as to which you differ, and the consequent variations upon which your estimate of the fair rent of the holding has been arrived at." These directions were given to the valuers, not by any mere administrative act of an unknown clerk, but in accordance with the long settled practice of the Court, and as an invariable preparatory step towards the rehearing of the case by the Land Commission. But I attach most importance, in dealing with the fact first, and the character afterwards, of this reference, to the official notice given by the Land Commission to the parties in March, 1897, without any day of the month at the top of it. The notice of rehearing was given on February 8; the Court valuers' report is dated March 15, so that there was no loss of time, and by this paper, headed March, 1897, which therefore must have been sent almost immediately after, the following communication was made to both parties:—"I am directed by the Irish Land Commission to inform you that for the rehearing by them of the above case, as required by the notice served for that purpose, *they have caused a valuation to be made of the holding.*" Though they say—"The parties are not bound to accept the Court valuers' estimate of the rent," they certainly do give them something amounting to a rather strong intimation that there is not

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much use in going on with the appeal in the face of the report. But that is a distinct notice that there had been a direction followed by a report; and having regard to the practice of the Commission from the commencement, I hold that we are bound, especially on an application such as this, to intend in favour of this report that it was furnished in accordance with a judicial direction; and we must come to the question whether that direction, and the reference which it made, were or were not authorised by the statute.

But Mr. Ronan made another preliminary point. He said:—"The two gentlemen to whom you sent this direction were not independent valuers," because an "independent valuer" must mean some person who had not been so concerned in the business as these two gentlemen were. Their only previous concern in the business appears upon the affidavits to have been that they had acted as Sub-Commissioners in valuing certain other estates in the same county, and that they were appointed by the Land Commission. Having acted before in another capacity, in valuing holdings, cannot make a man cease to be independent. Experience of some sort must be attributed to every man who purports to act as a valuer; and, if he is to be an expert at all, I cannot see that having acted in an official capacity in another department, in itself prevents a man from being independent. But the second point might require a further answer, namely, that they were not independent, because they were dependent upon the Land Commission for their appointment, and that the words "independent valuer" meant some valuer who had not had anything previously to do either with the parties or with the Commission. A reference to another section seems to me to answer that point. Section 48, sub-sect. 4, is in identical terms with section 37, sub-sect. 6, which enables similar assistance to be obtained by the County Court; and in the Act of 1887, section 32, I find that for aiding the County Court Judges in performing the duties imposed on them, "the Land Commission may from time to time, but subject to the approval of the Lord Lieutenant, nominate *independent valuers*, to some one of whom each County Court Judge may, whenever necessary, refer any question for report." That appears to me to be a distinct statutory statement that a person nominated by the Land

Commission, approved by the Lord Lieutenant, and paid by the Treasury, may be an "independent valuer" within the meaning of the Land Acts.

But yet another point was made—and no point was omitted—that there was no power to refer to two; and that only one was authorised. I should have had great difficulty about that, if the question was now raised for the first time, especially because the words "to some one of whom" are used in the case of the County Court, and "independent valuer" in the singular is the word with which we have to deal. Analogy also is against the extension to two; and the instances are many in which Mr. Ronan's industry has found the phrase "one or more" used, even up to the House of Lords itself, in enactments providing for calling in assessors. But upon *certiorari*, after the practice that has gone on for so many years, and after the parties themselves had got notice that, in accordance with that practice, two independent valuers had been here asked to report in place of one, and where the objection is made not to *the two*, but to *any* referee, I cannot possibly hold that doubling the valuers, of itself, makes the reference bad.

Therefore, treating this reference as being judicially made to independent valuers, we have next to see what is the effect of it. Upon that point I am bound to say that I differ, with all respect, from a great deal that was said by two, at least, of the Judges in the Court below, and I must therefore try to express my own opinion very clearly. "In determining any question relating to a holding" the Commission "may direct an independent valuer to report . . . his opinion . . . on any matter the Commission may desire to refer to such valuer, such report to be accompanied with a statement, if so directed, of all such facts and circumstances as may be required for the purpose of enabling the Commission to form a judgment *as to the subject-matter of such report.*" Then the Commission "may, or may not, as it thinks fit, adopt the report of the valuer." In my opinion the scope of the power to refer under that section is almost, if not altogether, unlimited, that is to say, its scope as regards what opinions may be asked for, upon, or about. The idea may have been that such references would take place during the course of the hearing. But no one can fail to see that if the course of waiting until the hearing

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before making a reference of this kind had been taken, the necessary result would be the duplication of hearings and the multiplication of expense. At the first hearing, the only thing to be done would be to make a reference to a valuer. There would have been a formal and a useless hearing, like what we used to have under the 15th sect. of the Chancery Procedure Act, 1850, and the second and real hearing could not come on until after the valuer's report had been got. The universal practice of the Land Commission, stated to have been beneficial and convenient, avoided formal waiting for the valuer's report by providing that his opinion should be taken, and should be ready, before the hearing came on. But as *the scope* is unlimited, so it appears to me that *the character* of the reference is strictly limited, and I hold that there is absolutely no power whatever, on the part of the Land Commission, to refer anything to any valuer for his opinion, in the sense of transferring any of its own jurisdiction to him, or of shifting it off upon him. The more I widen the scope of the power to refer, the more I limit the character of the reference when it takes place, and the words of the Act of Parliament appear to me to be as clear as words can be upon that point. The valuer is to report his "opinion," and the forming and reporting of that opinion must involve the investigation by him of questions of fact. This is proved by the circumstance that he is directed to accompany his report with a statement of all the facts required for enabling the Commissioners to form a judgment on the subject-matter. When they have got it, the Commissioners may, or may not, as they think fit, adopt the report. What then is the legal aspect, and effect, of such an unlimited power *to refer*, coupled, as it is, with an entire exclusion of any power whatever *to delegate?* I think we find an answer in *Re Dawdy* (1). Lord Esher says, dealing with a contention that a certain reference amounted to a reference to arbitration, "it has been held that if a man is on account of his skill in such matters appointed to make a valuation in such a manner that in making it he may, in accordance with the appointment, decide solely by the use of his eyes, his knowledge, and his skill, he is not acting judicially, he is

(1) 15 Q. B. D. 430.

using the skill of a valuer, not of the Judge. In the same way, if two persons are appointed for a similar purpose, they are not arbitrators but only valuers, they have to determine the matter by using solely their own eyes and knowledge and skill." Further on he practically repeats the same thing:—"I can see nothing in the first part of the clause of the document before me, which is to be interpreted on the same principles that we have to interpret the Act of Parliament, other than this, that two persons are to be appointed as valuers not arbitrators, there is nothing to show that they are to hear the parties and determine judicially between them." On page 431 he says:—"I come to the conclusion on the consideration of the agreement, that the two persons who are engaged are to be mere valuers, not arbitrators."

Starting with that, the important difference between my view and that taken by the Chief Justice and the Chief Baron in the Court of Queen's Bench arises at once on the "fair rent." I take the simplest case, a case not complicated by any question about improvements of any kind, a case not complicated by any items, but one in which the one and only question in litigation between the landlord and tenant is—"How much ought to be the fair rent of this holding, as between us?" It occurs to me that, under such circumstances, the amount of the fair rent is a thing which an expert is better qualified to decide than anyone else can be. I go to the Act of 1881, section 8, and I find that it—this fair rent—is to be ascertained by a consideration of the circumstances of the holding and the district, and other matters, including the interest of the landlord and tenant in the particular case, and I find that the power of asking the opinion of an independent valuer extends to any matter the Commission may desire to refer to such valuer. The Commission may, or may not, adopt the report; but I fail to see how it can possibly be made an objection to the reference, in such a case as I have put, if the subject-matter referred to the valuer for his opinion is the amount that ought to be the fair rent in that case between those two people.

Fair rents have been, in countless cases, settled by the aid of independent people of special knowledge and skill, out of Court, and such people, and even landlords and tenants unaided, have been able, I think, to understand that the rent fairly payable by

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an old occupier is not necessarily the same which could be got from a new comer, without puzzling themselves over "occupation interest." I cannot see that the Land Commission is disabled, by law, from seeking like help, or considering like matters, when doing the same thing.

The Queen's Bench has held that what is the fair rent is a mixed question of law and fact. With all respect, I prefer the view of O'Brien, J. He says that "in determining what is a fair rent, considerations of law must necessarily arise, and it must be fixed in accordance with the principles of law, but the fact that it is to be settled in accordance with the principles of law is a thing that won't make it necessarily a question of law itself." Some one said, when this argument was pressed here, that it was the same thing as fixing the price of a brass kettle. No price can be fixed for anything without bringing in principles of law. You might have to decide legal questions as regards the validity or application of a patent, even in fixing the value of a brass kettle, or the price might involve disputed or doubtful claims to specific advantages. It appears to me to be impossible to limit the scope of the power to refer the question of the amount of the fair rent, always safeguarding it by a distinct statement that it can be referred for opinion only, and that there must be an adjudication by the Land Commission, and by it alone. The Land Commission has very distinctly disclaimed, in Mr. Seaver's affidavit, having ever referred any question, except in the sense of calling for an opinion and report. I cannot fail to see that what occurred in this case, and what has occurred in others, naturally gave rise to the impression that they had done more. When the Sub-Commission pronounced its decision as to the fair rent and filled its pink schedule, that pink schedule and the order to which it was attached, amounted, if not reheard, to a complete adjudication upon the whole matter, and before the rehearing the whole of that was referred to the valuers by the Land Commission. In that sense the Lord Chief Baron's statement is fully in accordance with the fact. He says that "all these questions" —meaning the whole case—"were referred in his opinion." The Lord Chief Justice in the same way says that where they miscarried was "in putting into the hands of the Court valuers,

as defining the extent and limits of their duty, the documents which I have referred to as common form, acting under which the Court valuers purported to estimate the fair rent, for the purpose of reporting what, in their opinion, a fair rent should be, and the very estimation of the fair rent, even though made for the purpose of reporting an opinion, nevertheless involved the consideration of questions of mixed law and fact." I cannot adopt his view that this was a miscarriage, because I think that we are, at least on *certiorari*, bound to intend in favour of the Land Commission, that it did not make this reference to the valuers, otherwise than it was justified in doing—namely, for their opinion—and *In re Dawdy* (1) then becomes an authority in favour of the order of the Land Commission, because it puts on the act of placing the papers in the hands of the valuers the construction that they were so placed in their hands as valuers called upon to report their expert opinion and nothing more. As valuers, I think the Land Commission were entitled to look to them for a report, but when the report came back, the Land Commission was bound to exercise its own judgment, as a judicial authority, upon it.

We may suspect, and believe, and the parties naturally did believe, that the members of the Land Commission allowed this report to affect their minds too much, and to such an extent that the function of fixing the fair rent was really delegated to those who made the report. We cannot intend that they did so, and my opinion is that they did not do so. On the second inquiry, I find that evidence was taken with regard to the fair rent and the improvements, and that witnesses were heard on both sides with regard to the whole subject-matter. When the Act of Parliament gives power to the Land Commission to call for the opinion of the valuer, it also gives them power to adopt it, so far as they think fit. The scope of the word "adopt" must extend to whatever is covered by the true interpretation of the word, "refer." "Adopt" does not mean adopt *so as to make the report the order.* It appears to me to mean only that the Land Commission may use it, may agree with it, and may act upon it, and when Parliament gave this power, it is impossible on *certiorari* to find fault with the mode in which it has been used.

(1) 15 Q. B. D. 430.

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For these reasons it occurs to me that this order to refer was within the power of the Land Commission, and I would leave the matter there, but for the hope that the full discussion of this matter here, and the full expression of our views on the present occasion, may be of some practical use. I refer to what has happened since the hearing in the Queen's Bench, for the purpose of illustrating the difficulty of putting the narrower construction upon the scope of this power to refer. Bewley, J., stated that when the form was impugned, in deference to the opinions of the Judges of the Queen's Bench, the Land Commission took such steps as would make it impossible to contend in the future that anything in the nature of a question of law was involved in the report of the Court valuers, and the way in which that was done was by adopting a new form of report. We have got that new form of report, and I am bound to express my opinion that it does not meet, in substance, any one of the observations made by the Queen's Bench upon the former form. In reality, it is in every respect as objectionable as the former one was, if the Queen's Bench was right. It is curious that it was originally printed, and is still printed as of old, with the heading—"Valuers' report as to fair rent," and the words "fair rent" have only undergone the Russian process of obliteration, leaving them still perfectly legible. But this is a detail. In the body of it, No. 1 in the new form is the same as Nos. 1 and 2 in the old form, leaving out the figures; No. 2 is the old No. 5; No. 3 gives the result of the old No. 2, bringing the figures back again. The former No. 4 appears as No. 6; No. 5 is the old No. 3, and the only real difference between the two forms is that the words "fair rent" are left out, and the words "letting value" are put in instead, and the final computation, or result, is not given, though all the deductions, and the other materials for calculating the result, appear as before, with the single exception—apparently against the landlord's interest—that the figures which were given in the old form, showing the value of any improvements credited to the landlord, are omitted. Bewley, J., says that this form is to be no longer communicated to the parties because they would misunderstand it, and mistake the sum of the figures given for the fair rent. So they might, because the sum in compound arithmetic of

deducting the amount of the tenant's improvements from the "letting value" is not performed on the face of the paper. In that respect alone does this form materially differ from the old one. I think it is of very great consequence to point out that it is proved by this experiment to be impossible to frame any form of report to be given by a Court valuer that will not include the very thing that is said to be a mixed question of law and fact upon which he ought not to report at all—namely the amount of the fair rent. The old form appears to me to be in effect the same, so far as that question is concerned, as the new one, and, speaking for myself, I prefer a form which the parties got, and could understand, to a form which is withheld from them, because they would misunderstand it if they got it.

But there is one far more important thing still to be mentioned. No reference made in the preliminary way in which these references have been made, can ever be satisfactory to the parties, or can be regarded as a satisfactory mode of administering justice, if it is not made as fully known to the parties as it is to the Court. Litigants can not be left, under our law, in the dark as to the grounds of judicial decisions which affect them. I concur, in the strongest way, with what Bewley, J., has described as the "judgment of great weight," pronounced in 1882 by O'Hagan, J., with the concurrence of Mr. Commissioner Litton, holding that the parties should have an opportunity of seeing these reports. No form which the parties are likely to misunderstand can be a satisfactory one. If a report is made at all, it ought to be made so that everyone who sees it can understand it, and above all, the parties, when it is made, ought to see it before it is used against them. The practice, irregular if you will, that has been in existence since the commencement of this jurisdiction, of anticipating the order calling for these reports, has been, I believe, as Bewley, J. says it has been, of advantage and convenience to the parties, chiefly, if not entirely, because it has let them know beforehand what an independent valuer thinks about the subject-matter of the rehearing. If it were proved that the Land Commission, on the rehearing, acted upon the judgment of the valuers as an anticipation of the performance of its own duty by the Commission, I would hold its order to be bad, and I would

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hold that such a misfeasance could be shown by extrinsic evidence, and would be within the authority of the Queen's Bench to reach.

The last observation which I wish to make goes to the root of a principal part of the Chief Baron's judgment. I am not bound to express a definite opinion upon it here, but I cannot hold, without further argument than has yet been brought before me, that a Court of inferior and limited jurisdiction can, by making a pure mistake in law, *i.e.* by deciding a question of pure law wrongly, ever give itself a jurisdiction which it would not otherwise possess, and so prevent an order otherwise bad from being quashed on *certiorari*. Veil it as you will, if that is the *ratio decidendi* of two of the Judges of the Queen's Bench in this case, I entirely dissent from it. The impugning of the jurisdiction here on what is called the ground of real bias rests on the substitution for the statutory and constitutional judgment of a lawful Court the judgment of an unauthorised authority; and I do not believe that any inferior tribunal can, by any mistake either of law or of fact, substitute for the exercise of its own jurisdiction the exercise of a discretion by somebody else, or the judgment of anyone else. My Lord Chief Justice concludes his judgment on this point by answering the question with regard to "the man in the street." But, with every deference to him, I am unable to see that what he says would not be equally applicable to any unauthorised extension of jurisdiction to a valuer. "One topic," he says, "before I conclude. Mr. Ronan and Mr. Campbell asked somewhat impetuously, could the members of the Land Commission consult the man in the street—who is so frequently referred to by way of illustration—ask him to estimate a fair rent and adopt his opinion. It is to be remembered that the Land Commission, in the eye of the law, is an inferior Court, and if the members of the Land Commission were guilty of the gross misfeasance suggested, no Judge, no tribunal, would have any difficulty in holding that they were so biased as to render their decision the decision of an incompetent tribunal, and therefore capable of being challenged by *certiorari*." The same principle must apply, if they referred to valuers what they ought to have decided themselves. Those valuers would be to all legal intents and purposes only so many "men in the street," for the purpose of determining the validity of the tribunal, and the whole

foundation of this impugnment of an order of an inferior tribunal is that the case has been *coram non judice*, and that the decision is the decision of one who is *non judex*. In my opinion, for the reasons I have given, the reference was within the power of the Land Commission, because it was only a reference to take the opinion of the valuers, and after having taken the opinion of valuers the Land Commission must be taken to have decided this case upon its own judgment, and therefore the excess of jurisdiction and the misfeasance charged did not take place.

I am sorry to have occupied so much time; but my reason for doing so has been, as I have said, that I do believe that a full ventilation of the views which we entertain of the powers of the Land Commission in this most important matter, and of the mode in which that power ought to be exercised, distinguishing the jurisdiction which the Commission is bound itself to exercise from the assistance which it is at liberty to get from valuers, will tend to the establishment of the practice upon a basis that will be in accordance with the law, and will do justice, and will show that this Court does not sustain the order which has been impeached upon the very difficult and narrow ground that, although the Land Commission has been doing everything that is wrong, we cannot get at it by *certiorari*. I prefer to refuse the writ upon the more satisfactory ground that what has been done has been in the main right, although in the details of it, such, for example, as the statement of the special case, we may not feel satisfied with the course taken.

One word, and it is the last, upon the distinction between *mandamus* and *certiorari*. If in this case, upon what is proved in Mr. Monroe's affidavit to have been done upon the application to state a special case, the Court made an order refusing the application, without deciding that the application was frivolous and vexatious, it occurs to me that a writ of *mandamus* to consider and decide that question, or to state a case, might have been applied for, upon the principle of *Lord Rossmore's Case* (1), but that question is not before us in any shape or form. The order refusing to state a case was not made a subject of appeal; so far as I know, an application was not made for leave to appeal, nor does it appear

(1) [1894] 2 Ir. R. 394

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that the questions at issue could have been fully raised upon an appeal, but that is not the subject-matter of the application for a *certiorari*. The *mandamus* asked now is a *mandamus* to hear and determine the whole case, and is, therefore, consequential upon the *certiorari*. The *mandamus* given in the *Case of Lord Rossmore* (1) was a *mandamus* to consider an interlocutory application for liberty to state a case, which we considered had not been fully considered or decided. Similar materials to those on which we came to that conclusion might have been supplied by the affidavit to which I have referred in the present case, but the statement of a special case, if insisted on, would have probably left the matter exactly as it is, because the matters to have been discussed upon the case would have been practically the same which have been discussed now.

WALKER, L.J.:—

I concur. Mr. Ronan, as he was entitled to do, argued the appeal in this case on the facts and figures appearing in Shepherd's case. In it an order was made by the Sub-Commission on the 19th December, 1896, fixing the judicial rent at £36; the order had attached to it a schedule, as required by the Act of 1896. The only matter appearing on that schedule which I think it necessary to notice is the statement in it under the heading, "State any other matters in relation to the holding that have been taken into account in fixing the fair rent thereof," as follows:—"This holding is subject to the Ulster Tenant-right Custom, but no special deduction has been made on account thereof." This observation is only relevant if bearing on the statement regarding the custom appearing on the schedule to the order of the Head Commission.

I think the meaning of the statement in the Sub-Commission schedule is very plain. The Act of 1896 says: "No deduction shall be made except such deductions as shall be specified and accounted for" in the schedule; and this schedule, while it records an incident to the holding most desirable to mention, adds, in effect, no deduction capable of being stated, specified, or accounted for has been made by reason thereof. So all the parties understood it; for when the tenant served his notice of rehearing

(1) [1894] 2 Ir. R. 394.

on the 5th February, 1897, he stated as the grounds (being bound to set them out), that the deduction in respect of drains and fences was insufficient, that the acreable rent was too high, and that no deduction was made from the rent on account of the Ulster Tenant-right Custom. The landlord served a cross notice on the 8th February, based on the grounds that the acreable rent assessed was too low, and that the amount allowed for tenants' improvements was excessive. The complaint by both was as to the amount of the fair rent.

The appeal being thus at issue, Mr. Bomford and Mr. M'Afee were given at the office of the Land Commission the Sub-Commission schedule, and a form asking their opinion as to the estimate of fair rent which had been made. Those valuers made their inspection on the 9th March; and on the 13th March they made a report concurring in the fair rent.

The Land Commission on the 15th March served notice on the parties, informing them that for the rehearing they had caused a valuation to be made by Court valuers of the holding, and that the fair rent estimated by them was £36, but that the parties were not bound to accept that estimate. The rehearing took place on the 18th March; and on the 31st May an order was made affirming the sub-Commission rent, which in no way refers to or professes to be founded on the Court valuers' report; and this order has a schedule attached to it as required by the Act of 1896.

Leaving out of view for the moment the question whether there is anything on the face of that schedule to show want of jurisdiction which raises another consideration, the main contention for the appellant was based upon the fact and form of the Court valuers' report. Its form and the report thereon were assailed as made without, and in excess of, jurisdiction, such as to be capable of being extrinsically shown. The contention resolved itself into many heads:—

1. It was said there was no direction proved or given by the Commission to a valuer to make a report.

2. That a report could not be obtained from two but only from one valuer.

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3. That it was illegal for the Commission to ask for the report at the stage they did.

4. That the valuers were not "independent"; and lastly:

5. That the reference made was one of questions of law or mixed law and fact, and amounted to a delegation of all the duties cast upon the Commission, and in effect altered the constitution of the Court itself.

In result all these questions depend upon the construction of the powers in this respect given to the Commission, as it is admitted express power for some purposes is given.

It will be remembered that the Land Code, and I think designedly, contains no definition of fair rent. The Act of 1881 specifies certain matters which are to be taken into account in determining its amount, and I think a question whether a particular factor should or should not be taken into account may be a question of law, but the amount is not, and an appeal from its amount is excluded, apparently because it was considered a mere matter of value, on which also there can be no appeal. The Land Commission, as constituted, consisted of three members—a judicial Commissioner whose qualifications are of course defined, and two whose qualifications are not. A provision that they should be able to obtain skilled assistance, in the opinion of skilled men, was a most natural one. [The Lord Justice read sect. 48, sub-sect. 4.] When the valuers were employed a notice of appeal had been given by both sides, and an issue (in this case apparently of mere value) had been raised. I do not, however, desire to avoid the determination of the general question. First as to the stage at which the reference was made. Why should not the Commissioners take steps to have the report at the coming hearing? It is obviously convenient. The objection as to the stage at which the report was sought seems to me wholly unsubstantial, and if yielded to would produce confusion and inconvenience and delay. Next I read the word "independent" as equivalent to not engaged for either party, and having no interest. That they valued before in the County Armagh would seem only to improve knowledge, and I decline to say that an assistant Commissioner nominated by the Lord Lieutenant is not independent, because he has been so

nominated. The words authorising the reference are of the largest kind—"any question" is equivalent to "any one or more questions." So are the words "any matter," and the direction to include a statement of facts and circumstances involves an ascertainment on the spot of matters of fact by the sight and ears of the valuers. The Commission form a judgment on the report. They reject it or act on it, but the judgment, and action, or rejection are theirs. The words "form a judgment" show that the duty and responsibility are expressly reserved to them. Look to the course of practice. *Adams* v. *Dunseath* (1) was heard on the 9th January, 1882. It was, I believe, the first appeal heard. No one questioned the propriety of the employing of two Court valuers. The only contention was over the stage at which the report should be made known to the parties, and many Land Acts have been passed since without interfering with the settled practice on which the rights of so many thousands have been settled. It seems to me obvious that the questions asked in the reference might be asked separately, and if so why not in the one reference?

Take the crucial case—Is it lawful under section 48, sub-sect. 4, to ask the advice and assistance of a valuer as to what should be the fair rent of the holding? I must say for myself that I emphatically decline to give any definition of fair rent. An exhaustive definition was never intended by the code, and any definition purporting to be exhaustive which I have yet seen suggested seems to me to contain some adjective or descriptive word itself requiring definition and explanation.

Suppose a landlord and tenant are about entering into an agreement to fix a fair rent under section 8, sub-sect. 6, and the landlord asks a valuer to report to him what he thinks should be the fair rent, would anyone suppose that he was doing more than seeking skilled opinion upon a question of fact—the fair rent to be paid under all the circumstances. Perhaps an evolution of the facts and circumstances to be stated will raise some legal question on which the Land Commission may have to decide, and some one or more of the constituent elements for consideration in

(1) 10 L. R. Ir. 109.

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estimating the rent under the Act of 1881, may become a fit subject for a case stated, but fair rent in result must, I think, be always an estimate and matter of value.

I think the subsidiary question, whether there was any direction to refer is closed by the letter of the Land Commission of the 15th March, taken in connexion with what preceded it; and it would be altogether too technical in the face of the long settled practice to refuse to read, "an independent valuer" as equivalent to one or more valuers. If I am right, the argument founded upon any supposed delegation of duties, or the referring to the valuers questions of law, or mixed questions of law and fact, falls to the ground. They refer nothing for decision or determination, and they retain and are charged with the duty of forming an independent judgment.

But assuming they interpreted the express power of reference given to them too widely, and I limit it to such a misconstruction as is short of delegation of duties, can this mistake be reached by *certiorari*? What is their position? They have clear jurisdiction over a subject-matter which exists—the relation of landlord and tenant. They have authority to decide all questions of law and fact. All proceedings before them are judicial proceedings of a Court of Record, and *certiorari* is expressly taken away.

There is no doubt that an unauthorised association of a third person in their judicial proceedings and decision would affect the competency of the Court and create an objection to its jurisdiction, the existence of which could be shown by extrinsic evidence. This is a type of the class referred to in *The Colonial Bank of Australasia* v. *Willan* (1).

There is another rule appearing in some of the cases, and referred to by Mr. Ronan, that a Court of limited jurisdiction cannot give itself jurisdiction by an erroneous decision that it possesses it; that is, as a general rule true. Lord Denman says of that rule in *Reg.* v. *Bolton* (2): "It is obvious that this may have two senses: in the one, it is true; in the other, on sound principle and on the best considered authority, it will be found untrue." In applying that rule regard must be had to the

(1) L. R. 5 P. C. 417. (2) 1 Q. B. 72.

statutory powers of the Court—whether the question is a branch of the subject over which the Court has jurisdiction as to law and fact, or (and here we come to a different consideration) is a matter collateral to the merits upon which the limit of the jurisdiction depends, or is a presumed legal bias arising from circumstances which can be extrinsically proved.

It cannot, I think, be contended that when a Court is engaged in an inquiry over which it has jurisdiction, and having power to decide all questions of law and fact that may arise in it, makes an erroneous decision honestly on a matter which it might have decided rightly, an error has arisen which vitiates an order upon which it does not appear to be founded. The only objection to the exercise of jurisdiction here, when properly considered, seems to me to be that the Land Commission, having an issue before them which they were competent to try, and having power to seek advice and assistance for the purposes of that issue, determined erroneously the legal extent of their powers of reference, and asked for an opinion in too general terms, acting honestly in this error.

It is not necessary for me to express any opinion upon some of the questions raised in the judgments in the Queen's Bench Division arising upon an assumption of delegation which I do not think exists, but I am not to be taken as expressing any dissent from any of the conclusions arrived at by the Lord Chief Justice and the Lord Chief Baron.

As to the schedule itself I do not think it necessary to add anything to what has been already said upon the question whether any defect of jurisdiction appears on the statements in it as to fences and buildings; we are not hearing an appeal from the order.

With regard to the statement—"The holding is subject to the Ulster Tenant-right Custom," it is in the first place a most proper and convenient matter to record, and it by no means follows that a deduction has been made from the rent on account of its existence, and on *certiorari* we cannot intend it.

I believe the decision in *Reg.* (*Gosford*) v. *The Irish Land Commission* will lead to a final settlement of the practice, and putting it on a firm basis, and in that sense the litigation may

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prove useful. At one period of the case I doubted if it could have any useful result. If it leads to a recurrence to the practice so long settled both as to the form of the reference and report, and the mode of dealing with it, I for one shall not be dissatisfied, and I join in the expression of the hope that it may.

HOLMES, L.J.:—

Although the grounds upon which I have come to the conclusion that the conditional order for the issue of the writs of *certiorari* and *mandamus* ought to be discharged differ in one respect from those relied on by the Judges of the Divisional Court, my complete concurrence with most of the propositions to be found in their judgments enables me to state my views with comparative brevity.

I agree with the Queen's Bench Division in holding—1. That the Land Commission is not a Superior Court in the technical sense in which that phrase is used in our law, and therefore it may be possible under certain circumstances to have orders made by it quashed by means of the writ of *certiorari*. 2. That it is an independent, although not a Superior Court, and is authorised to decide all questions of law, or fact, arising in matters within its jurisdiction. 3. That as it is expressly enacted that proceedings before it cannot be removed by *certiorari*, the writ of *certiorari* can only issue either (*a*) where it has acted altogether without jurisdiction or, in other words, where it had no power to enter upon the inquiry; or (*b*), where a want of jurisdiction appears on the face of its order. I understand that these propositions are substantially admitted by all the counsel by whom the appeal has been debated, and that the grounds upon which the appellant rests his case are that the order itself shows a want of jurisdiction, and that even if it were valid on its face, circumstances had occurred which had the effect of completely depriving the Land Commission of jurisdiction to enter on the judicial investigation which resulted in the order.

It has not been questioned by the appellant's counsel that the schedule dated the 31st May, 1897, is incorporated with the order of the same day, and indeed not only their arguments but also the conditional order itself are based upon the fact that the schedule

and order are to be read together as a single document. The absence of a reference in the one paper to the other is at most a clerical error, which could and would be corrected by the Land Commission on application of either of the parties; and therefore without adopting the ingenious means of incorporation resorted to by the Chief Baron, I have no difficulty in holding that the two documents taken together constitute the order of the Court.

Cope v. *Cunningham* (1) was a case stated, which it was possible to dispose of without deciding whether an order fixing a fair rent, where there was no schedule, would be made without jurisdiction. But I agree with the view of Palles, C.B., and Fitz Gibbon, L.J., in holding that the jurisdiction to fix a fair rent cannot be lawfully exercised in the absence of a request to the contrary from the landlord and tenant, without ascertaining and recording in the form of a schedule the matters prescribed by the first section of the Land Law (Ireland) Act, 1896. There is, however, nothing in the propositions laid down by them to justify the inference that where the Land Commission purports to ascertain and record those matters, the order is rendered null by the fact that there is some irregularity, vagueness, or mistake in the contents of the schedule. There are many ways in which the nature and character of improvements may be recorded. In Rooney's case the improvements are stated to be fences and buildings, the removal of boulder-stones and drains of a certain measurement; and the present capital value of each is given with the increased letting value due thereto. This is certainly a compliance in terms with the provisions of the section; and it would be the introduction of an entirely novel principle of law to hold that the document itself and the order based upon it are vitiated merely because the description might be made more specific than the Court having the jurisdiction to frame it considers necessary. The same observations apply to the particulars of the increased letting value due to improvements, and of the deductions from the rent on account thereof. It is the duty of the Land Commission to ascertain these amounts; and, if in doing so, there is an error in either law or fact, it may be corrected on appeal, or by a case stated, but affords no ground for a writ of *certiorari*.

(1) [1897] 2 Ir. R. 467.

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The statement No. 8 presents a greater difficulty. On the one hand I am of opinion that the only matters intended by the section to be mentioned here are matters, the direct effect of which is to reduce the fair rent below what it would otherwise be—on the other hand I am opinion that the fact of a holding being subject to the Ulster Tenant-right Custom can have no such effect directly, although indirectly, by raising a presumption regarding improvements, or in some other way, it may be of importance. If I am right in these views, the reference to the Ulster Tenant-right Custom is out of place. But the Land Commission has jurisdiction to decide all these points; and the question really is what, according to the true construction of the language, has been decided? If the decision is that, having taken into account that the holding is subject to the custom, the Land Commission is of opinion that the amount of the fair rent ought not to be affected thereby, no objection can be taken to the statement. If, on the other hand, the meaning is that the fair rent has been by reason thereof reduced, it would then seem to me that an essential part of the schedule has been omitted altogether, namely, the amount of such deduction; and that therefore the fair rent has not been ascertained at all in the manner provided by the statute. Between these two constructions, the intendment ought to be in favour of that which would not nullify the order. The words are, in my opinion, capable of either meaning. The absence of the amount is in favour of the first-mentioned; and accordingly I adopt it, with the resulting conclusion that there is no want of jurisdiction apparent on the face of the order.

The remaining question is whether the Land Commission, by the reference to the two valuers, deprived themselves of jurisdiction to enter on the inquiry. Now, I think it clear that if a limited jurisdiction is given by statute to an inferior tribunal to decide certain matters in litigation, and if before it begins its inquiry, it were, without statutory authority, to call for, and receive, a report from an outsider of his views on some of the very subjects which it was bound to decide judicially, it would be thereby disqualified from hearing the case. The ground of a disqualification of this kind is that an improper bias or prejudice on the part of the tribunal would be a probable result of its action.

It amounts to legal misconduct, which does not necessarily involve any moral delinquency. Indeed in most of the cases where an inferior Court is held to have lost its jurisdiction on this ground, its members protest that they have not been affected in any way, and in many they have not as a matter of fact been consciously influenced. The result would, in my opinion, be precisely the same, if the Court having a limited authority to call for a report, were to exceed such authority by procuring one on matters which it had no power to refer. A tribunal cannot free itself from the effect of misconduct by showing that it was led into the misconduct by an innocent but erroneous conception of its powers. I agree with O'Brien, J., in holding that the rule which makes an inferior tribunal the judges of law as well as of fact, and makes the admission or rejection of evidence improperly, no ground of objection to its decision, does not apply to anything but the hearing in which the decision was made, and cannot be held to cover the illegal execution of a statutory power in a collateral proceeding, which is made the means of producing an element in the result. For these reasons if I were of opinion that the reference was either wholly or in a substantial part illegal, I should be obliged to hold that the order was made without jurisdiction.

This is the point on which I differ from the judgments of the Divisional Court, and which obliges me to examine the character of the report. There are one or two preliminary matters to be considered. It is strongly argued for the appellants that the only reference contemplated by the statute was a reference on some subject arising in the progress of the hearing, and that it could only be made to a single person. If the question had been raised soon after the Act of 1881 was passed, much might have been said on both sides, but the best interpreter of a statute regulating legal procedure is the continuous procedure that has followed it. From the year 1881 to the present time, the uniform practice has been to make a reference before the rehearing, and generally to two persons. Litigants in their thousands have come and gone; there have been appeals after appeals to this Court in which the valuers' report has been referred to; there have been many amending statutes; and until the present case it has never been suggested that there has been any illegality in either the period of the

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reference, or the number of the valuers. I do not feel myself at liberty to give a construction to the provision which would be opposed to the construction that has been acted on for sixteen years, and which would nullify every fair rent order made by the Land Commission.

It is further said that there is no order of reference at all; and there is no doubt that what has happened in the present case shows great looseness and irregularity of practice. One would expect that in a matter of so great importance, and of such constant recurrence, there would be a general order of the Land Commission showing, by means of a *rota* or otherwise, to whom successive references were to go, and defining with precision what was to be done under them. The practice, in so far as it can be gathered from what occurred in the cases before us, seems to be that there is handed to two valuers by an official of the Land Commission the pink schedule prepared by the sub-Commission pursuant to sect. 1 of the Act of 1896, accompanied by a printed paper, in which the valuers are requested, in the event of their agreeing with such schedule, to sign an appended memorandum, stating their concurrence; and in the event of their differing therefrom, to state in a form annexed the matters as to which they differ. Now if there was no reference by the Land Commission, there would be foundation for the appellant's argument. But there is no doubt that what was done was done with its authority, and is expressly recognized in their secretary's letter dated March, 1897.

The nature of the reference can only be understood by an examination of the pink schedule. In what I am about to say on this subject, I am giving only my own opinion. The matter is most contentious and difficult. As I have come to a very decided conclusion regarding it, and as such conclusion is, in truth, the foundation of my judgment, I state it without hesitation; but, in doing so, I commit no one except myself.

Requirement No. 1 contains nothing which a person inspecting the farm cannot see for himself. Requirement No. 2 is for a statement of the fair rent of the holding on the assumption that all the improvements thereon had been made, or acquired, by the landlord. It has been assumed that what is here asked for involves questions of law as well as fact, and therefore cannot be legally referred to

a valuer. My view is that it is not only a matter within the province of a valuer, but also that it is a matter upon which the opinion of a valuer is of great assistance. Long before the Statute of 1881 was contemplated, it was to my own knowledge usual upon estates, where there was to be a revision of rents, and where the relations between landlord and tenant were friendly, for the former to appoint a Land valuer of reputation, in whom it was supposed the tenants would have confidence, to revise the rents. What the valuer was supposed to do was to fix *fair rents*, that is to say, rents which a tenant who was there, and had no desire to leave, might be reasonably asked to pay, and which a landlord, who had no desire to get rid of him, might be reasonably asked to receive. He was called on for his professional opinion on a matter of fact, and not of law. Latterly a great deal has been heard about the reduction of what would otherwise be the amount of the fair rent by reason of the value of the tenant right, or of the tenant's occupation interest. These speculations seem to me to be the figments of a too active imagination, for which I can find no countenance in any statute, or judgment of any authoritative Court. They appear to have originated in the idea that a fair rent is to be arrived at by the application of purely technical rules without any regard to the dealings of men with each other. A qualified valuer ought to have the technical skill to know the productive capacity of the soil, the cost of production, and the price of produce. He ought also to have such experience as to enable him to understand the circumstances of the case, holding, and district, including of course a knowledge of the rents generally paid therein. Thus equipped, he is able to form a valuable opinion as to what should be the fair rent in the sense which I have given to the term—the only intelligible sense of which it is capable. A fair rent in this sense would certainly not be the rent, which at a public competition might be recklessly offered by a person, whom wealth, or poverty, or land hunger, had made improvident, nor would it be a rent arrived at without any regard for the price which the industrious, and sensible farmers in the neighbourhood are willing to pay for land.

Returning then to the pink schedule, I am of opinion that requirement No. 2 is a proper subject for reference to a valuer.

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The remainder of the schedule deals with valuation dependent upon certain specified matters of fact. Now, I think the true inference to be drawn from the handing of this document to the valuers, and the true construction of the paper that accompanied it, is that the valuers were asked to state their concurrence or disagreement with it in so far as it was a valuation, and on the basis of the matters of fact set forth therein. That this was what was understood by the Land Commission appears from the letter of March, 1897, in which it is called a valuation. I should have so regarded it, if I had received it myself as a valuer ; and the intendment of the law being in favour of what is lawful, I have no hesitation in so construing it.

For these reasons I am of opinion that the Land Commission did not deprive itself of jurisdiction by this reference. The conditional order, therefore, cannot be supported on either ground.

Solicitors for the Earl of Gosford : *Monroe & Anderson.*
Solicitor for the Irish Land Commission : *W. Alexander.*

R. D. M.

Land Com. 1898. June 6.

RIPLEY, TENANT; MACNAGHTEN, LANDLORD (1).

Landlord and tenant—Land Law (Ireland) Act, 1896, sect. 1, sub-sect. (1) (a) —Fair rent—Competitive value—Occupation interest.

The ascertainment of a fair rent under the Land Law (Ireland) Act, 1896, sect. 1, sub-sect. (1) (*a*) should not proceed upon the basis that the holding is *in the landlord's hands* free from any tenancy and available for letting to a solvent and prudent tenant desirous of acquiring a permanent as distinguished from a temporary tenancy; inasmuch as the assumption that the holding is in the landlord's hands would necessarily involve the element of competitive value, which ought to be excluded in estimating a fair rent.

No deduction is to be made from such rent in respect of occupation interest.

This appeal was heard at Armagh. The question submitted to the Court for its consideration was, whether the annual sum

(1) The question in this case was also raised in seventeen other cases, heard respectively in Armagh and Dublin.

referred to in paragraph (*a*) of sect. 1, sub-sect. (1), of the Land Law (Ireland) Act of 1896, was the annual sum at which, after all the circumstances of the case, holding, and district, have been taken into consideration, the holding in the landlord's hands might reasonably be expected to let from year to year to a solvent and prudent tenant, who desired to derive a benefit from the occupation of the tenement and not from its sale; and whether the fair rent of the holding in paragraph (*g*) of the same sub-section (or the net fair rent), was the gross fair rent, less a reasonable annual allowance in respect of the sum which would represent the present value of the improvements.

Mr. Peel, solicitor, represented the tenant.

C. Murphy, for the landlord.

MEREDITH, J.:—

In this and other cases in the same estate, Mr. Murphy, as counsel on behalf of the landlord, contended that the principles upon which a fair rent should be fixed must have been disregarded by the Sub-Commissioners and the Court valuers alike. He argued that the evidence produced before us on behalf of the landlord demonstrated that consciously or unconsciously a deduction in respect of what is familiarly known as "occupation interest" had been made from the gross fair rent, and he urged that any such deduction was illegal and improper, and that it had been established by the cases of *Markey* v. *Lord Gosford* (1) and the *Queen* (*Lord Gosford*) v. *The Irish Land Commission* (2), that it was the duty of this Court when ascertaining (in accordance with the provisions of section 1, sub-sect. (1) (*a*), of the Land Act of 1896), "the annual sum which should be the fair rent of the holding, on the assumption that all the improvements thereon were made or acquired by the landlord," to deal with the case upon the basis that the holding was in the landlord's hands, free from any tenancy and available for letting to a solvent and prudent tenant desirous of acquiring a permanent as distinguished from a mere temporary tenancy. The same proposition (more or less elaborated) was advanced for our

(1) 31 Ir. L. T. R. 97. (2) *Ante*, p. 399.

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acceptance in the remaining appeals heard at Armagh (particularly in the case of *Blair* v. *Lord Gosford* (1)) and also at our sitting in Dublin, for the county of Louth. At the Dublin sitting, Mr. Donaldson as counsel for Mr. Ross L. Moore, the landlord and appellant in several cases, handed in at the close of his argument a document (in the form of a question) embodying in succinct form the contention he was instructed to urge. That document is as follows:—

"Whether the annual sum referred to in paragraph (*a*) of sect. 1, sub-sect. (1) of the Act of 1896, is the annual sum at which, after all the circumstances of the case, holding, and district, have been taken into consideration, the holding in the landlord's hands might reasonably be expected to let from year to year to a solvent and prudent tenant, who desired to derive a benefit from the occupation of the tenement and not from its sale, and whether the fair rent of the holding in paragraph (*g*) of the same section (or the net fair rent), is the gross fair rent, less a reasonable annual allowance in respect of the sum which would represent the present value of the improvements?"

The interrogative form has been adopted for obvious reasons, but Mr. Donaldson asked us to turn the question into a requisition of counsel, and insisted that as a matter of law the Court was bound to answer the question in the affirmative, and to fix the fair rents in these and all other cases upon the basis and assumption indicated in the requisition. Mr. Donaldson urged (as Mr. Murphy had already urged) that the views expressed by the Court of Appeal in the case of *The Queen* (*Lord Gosford*) v. *The Irish Land Commission* (2), in reference to the case of *Markey* v. *Lord Gosford* (3), demonstrated the accuracy of his legal proposition, and he relied upon the judgments of Fitz Gibbon, L.J., and Holmes, L.J., as briefly reported in the *Irish Law Times*. Since the argument we have been furnished, through the courtesy of the authorized reporter of the Court of Appeal, with full copies of the judgments referred to, and we are now in a position to state our views upon the questions argued before us. I indicated during the argument that so far as regards the question of "occupation interest" the case appeared

(1) Reported on case stated, *infra*, p. 453. (2) *Ante*, p. 399.
(3) 31 Ir. L. T. R. 97.

to me closed in favour of the landlord by the decision in *Markey* v. *Gosford* (1). I have read the judgments in that case with the utmost care, and I entertain no doubt that the decision of the majority of the Land Commissioners amounted to an express and unequivocal declaration that any deduction in respect of occupation interest (whether conscious or unconscious, disclosed or undisclosed), from what would otherwise be the fair rent of a holding within or without Ulster, is illegal and improper. It is right that I should say that my own view entirely coincides with that of the majority of the Commissioners, but in saying so I must express my regret that I have the misfortune to differ (in this respect), from the judgment of my distinguished predecessor, Mr. Justice Bewley.

The question of "occupation interest" is however only one of the points involved in the argument of Mr. Murphy and the requisition of Mr. Donaldson. The main point insisted upon by counsel was the necessity for the insertion of the words "in the landlord's hands" as a guiding and determining factor in the ascertainment of the gross fair rent under sect. 1, sub-sect. (1) (*a*), of the Act of 1896. Now, I was under the impression during the argument that this point also had been decided in *Markey* v. *Gosford* (1), but *adversely* to the contention of Mr. Murphy and Mr. Donaldson. Careful consideration of the case as reported in the *Irish Law Times* has confirmed my impression. Mr. Justice Bewley, as well as the three other Commissioners held, as it seems to me, that the Court was not bound to insert and would not insert in sect. 1, sub-sect. (1) (*a*), of the Act of 1896 the words, "in the landlord's hands," and thus read the section as if the Legislature had enacted as follows—"on the assumption that the holding was in the landlord's hands, and that, &c."

I desire to refer to some passages in the judgments delivered in *Markey* v. *Gosford* (1) in order to make this clear.

[His Lordship referred to the judgments, and continued]:—It is plain I think from these passages that all the questions raised by Mr. Murphy were discussed and decided in *Markey* v.

(1) 31 Ir. L. T. R. 97.

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Gosford (1). The Court decided that sect. 8 of the Act of 1881 was still the guiding and governing section, and that sub-sect. (1) of the 1st section of the Act of 1896 dealt with procedure and not with principles. The Court further held, and, in my own humble judgment, rightly held, that they were not bound to insert and should not insert in the statute words which the Legislature did not insert. For myself I cannot help thinking that the expression "in the landlord's hands" is manifestly susceptible of more than one meaning, and unless defined and restricted and safeguarded by further and elaborate definition, would be distinctly ambiguous. In the absence of such definition it almost necessarily (as it seems to me) involves the introduction of the element of competitive value into the estimate of a fair rent, and every member of the Court, in *Markey* v. *Gosford* (1), emphatically held that the element of competition must be excluded. But does the refusal to introduce these words, as a guiding principle or rule of law, involve an allowance for occupation interest, or the rejection of evidence as to the fair letting value of the holding or the rents which industrious, prudent, and solvent farmers in the neighbourhood would be willing and able to pay for similar holdings. In my opinion it does not, and my colleagues Mr. Commissioner Wrench, Mr. Commissioner Fitz Gerald, and Mr. Commissioner Lynch who took part with me in the hearing of these cases, concur in my view.

Briefly stated, the decision of the majority of the Court in *Markey* v. *Gosford* (1), (as I read it) was that the gross fair rent under sect. 1, sub-sect. (1) (*a*), of the Act of 1896, should be ascertained and estimated in the way in which the fair rent would have been ascertained and estimated as between landlord and tenant prior to the Act of 1896 in the case of a holding, all the improvements on which had been made or acquired by the landlord—excluding the element of competition value on the one hand—and making no allowance or deduction in respect of occupation interest on the other. From the annual sum so ascertained a deduction should be made (in accordance with the Land Acts) in respect of the tenant's improvements, in order to arrive at the fair rent of the holding. In this way we endeavour to find "the 'fair rent' which the Land Commission is bound to fix as distinguished from the 'competition

(1) 31 I. L. T. R. 97.

rent' which the landlord is no longer at liberty to exact." See judgment of Fitz Gibbon, L.J., in *Curneen* v. *Tottenham* (1).

So far I have dealt with the contention that the case of *Markey* v. *Gosford* (2) supports the argument advanced on behalf of the landlords. I now approach the case of *The Queen* (*Lord Gosford*) v. *The Irish Land Commission* (3). Of course Mr. Murphy and Mr. Donaldson did not argue that the decision of the Court of Appeal in that case ruled the points involved in the present argument. The learned counsel did, however, urge that in the judgments were to be found expressions of opinion strongly supporting the landlord's contention. I have not been able to discover any such expressions of opinion. [His Lordship referred to the judgments.]

The judgment of Holmes, L.J., was particularly relied on, and our attention was directed to the following passage (4): (I read from the authorized reporter's note of the judgment.) Speaking of the reference to the Court valuers, the Lord Justice says:—"The nature of the reference can only be understood by an examination of the pink schedule. In what I am about to say on this subject, I am giving only my own opinion. The matter is most contentious and difficult. As I have come to a very decided conclusion regarding it, and as such conclusion is in truth the foundation of my judgment, I state it without hesitation; but, in doing so, I commit no one except myself. Requirement Number 1 contains nothing which a person inspecting the farm cannot see for himself. Requirement Number 2 is for a statement of the fair rent of the holding on the assumption that all improvements thereon have been made or acquired by the landlord. It has been assumed in argument that what is here asked for involves questions of law as well as fact, and therefore cannot be legally referred to a valuer. My view is, that it is not only a matter within the province of a valuer, but also that it is a matter upon which the opinion of a valuer is of great assistance. Long before the statute of 1881 was contemplated it was, to my own knowledge, usual upon estates where there was about to be a revision of rents, and where the relations between landlord and tenant were friendly, for the former to appoint a Land valuer of reputation, in whom

(1) [1896] 2 Ir. Rep. 363.
(2) 31 Ir. L. T. R. 97.
(3) *Ante*, p. 399.
(4) *Ante*, p. 444.

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Meredith. J.

it was supposed the tenants would have confidence, to revise the rents. What the valuer was supposed to do was to fix *fair rents*, that is to say, rents which a tenant who was there, and had no desire to leave, might be reasonably asked to pay, and which a landlord, who had no desire to get rid of him, might be reasonably asked to receive. He was called on for his professional opinion on a matter of fact and not of law. Latterly a great deal has been heard about the reduction of what would otherwise be the amount of the fair rent, by reason of the value of the tenant-right, or of the tenant's occupation interest. These speculations seem to me to be the figments of a too active imagination, for which I can find no countenance in any statute or judgment of an authoritative Court. They appear to have originated in the idea that a fair rent is to be arrived at by the application of purely technical rules, without any regard to the dealings of men with each other. A qualified valuer ought to have the technical skill to know the productive capacity of the soil, the cost of production, and the price of produce. He ought also to have such experience as to enable him to understand the circumstances of the case, holding, and district, including of course a knowledge of the rents generally paid therein. Thus equipped, he is able to form a valuable opinion as to what should be the fair rent in the sense which I have given the term, the only intelligible sense of which it is capable. A fair rent, in this sense, would certainly not be the rent which at a public competition might be recklessly offered by a person whom wealth, or poverty, or land hunger, had made imprudent; nor would it be a rent arrived at without any regard for the price which industrious and sensible farmers in the neighbourhood would be willing to pay for land."

It appears to me that there is not a sentence in these judgments which really conflicts with the views I have already indicated. Possibly the words "public competition," "recklessly offered," used by Lord Justice Holmes, may appear to give rise to a difficulty. Rightly or wrongly, we hold that any form of competition, which has the effect of unduly inflating the letting value of a holding beyond what would otherwise be its fair letting value, is not to be taken into consideration as a ground for increasing the fair rent. No one, of course, can doubt that competition

is seen at its best or worst (according to the point of view from which it is regarded) amid the excitement of the crowded auction mart; but the price of land, as well as of any other property, may (as it seems to us) be abnormally and unduly raised by a person whom wealth or poverty or land hunger has made imprudent, but whose operations are not carried on at a public auction. I myself regard the expressions, "public competition," "recklessly offered," which occur in the judgment of the Lord Justice, as intended to be illustrative, not exhaustive. Subject to this, it appears to me that the opinions expressed in the judgments to which I have referred do not conflict with or over-rule the views of the majority of the Land Commissioners as expressed in *Markey* v. *Gosford* (1). The rents which have been fixed by us in this and the other cases in which I am about to deliver judgment have been fixed in accordance with the views I have indicated.

Solicitors for the tenant: *Peel & Co.*
Solicitor for the landlord: *Harris.*

J. MAC M.

EARL OF GOSFORD, LANDLORD; BLAIR, TENANT (2).

Appeal. 1899. Feb. 6, 7, 22.

Landlord and tenant—Land Law (Ireland) Act, 1896, *s.* 1, *sub-s.* (1) (*a*) (*g*)—*Fair rent—Occupation interest—"Circumstances of the case, holding, and district."*

The Irish Land Commission having at the request of the landlord stated a case for the Court of Appeal, raising the question whether in fixing the fair rent of a holding the Court is bound to assume and to fix the fair rent upon the assumption (*a*) that the annual sum referred to in sub-sect. (1) (*a*) of sect. 1 of the Land Law (Ireland) Act, 1896, is the annual sum at which, after all the circumstances of the case, holding, and district, have been taken into consideration, the holding in the landlord's hands might reasonably be expected to let from year to year to a solvent and prudent tenant who desired to derive a benefit from the occupation of the tenement and not from its sale; (*b*) that

(1) 31 I. L. T. R. 97.
(2) Before FITZGIBBON, WALKER, and HOLMES, L.JJ.

Appeal. 1899.

GOSFORD, *Landlord*; BLAIR, *Tenant.*

the fair rent of the holding referred to in sub-sect. (1) (*g*) of section 1 of the Land Law (Ireland) Act, 1896, is the annual sum referred to in sub-sect. (1) (*a*) of the same section less by a reasonable allowance in respect of the sum which would represent the present annual value of the improvements made by the tenant; the Court of Appeal declined to answer the question on the grounds that it was not a question of law which was within their jurisdiction to determine; that it was an abstract question, the answer to which would not necessarily affect the determination of the fair rent of the holding before the Court, and could not be of general application to other cases: and that the question was ambiguous and indefinite.

APPEAL by way of case stated from the decision of the Irish Land Commission. The case stated was as follows:—

"1. The area of the holding in this case is 25A. 3R. 10P., statute measure; the Poor-law valuation is £27 15*s.* on land and £5 10*s.* on buildings; total, £33 5*s.*

"2. The rent of the holding at the date of the passing of the Land Law (Ireland) Act, 1881, was £29 6*s.* 6*d.* By order of this Court dated the 12th day of May, 1883, the fair rent of the holding was fixed at £22 10*s.*

"3. The tenant having served notice of an intention to fix a fair rent for a second statutory term, the case was heard by a sub-commission, who by order dated the 18th day of February, 1897, fixed the fair rent of the holding payable during the second statutory term at £16 13*s.* 11*d.* We refer to the said order and schedule of particulars of even date therewith.

"4. The landlord served notice requiring the case to be reheard before three Land Commissioners sitting together.

"5. The case was reheard before us at Armagh on the 5th day of May, 1898, when Mr. Charles Murphy, as counsel on behalf of the landlord, contended that in fixing the fair rent of the holding the Court was bound as matter of law to assume, and to fix the fair rent on the assumption, that the annual sum referred to in sub-sect. (1) (*a*) of section 1 of the Act of 1896, hereinafter called 'the gross fair rent,' was the annual sum at which, after all the circumstances of the case, holding, and district, have been taken into consideration, the holding in the landlord's hands might reasonably be expected to let from year to year to a solvent and prudent tenant who desired to derive a benefit from the occupation of the tenement

and not from its sale, and that the fair rent of the holding referred to in sub-sect. (1) (*g*) of the same section is the gross fair rent less by a reasonable allowance in respect of the sum which would represent the present annual value of the improvements made by the tenant. At the close of the case Mr. Murphy submitted to us a requisition in point of law which was expressed in similar terms.

"6. We do not think it necessary to state the conflicting evidence which was given on behalf of the landlord and tenant respectively (and which was taken down by the official shorthand writer) as this case is conversant solely with a question of law of general application.

"7. We reserved judgment in this case, and in eight other cases on the same estate in which the landlord's counsel put forward the same contention, and on the 6th day of June, 1898, we delivered judgment in Dublin. We declined to accede to the requisition of counsel for the landlord, being of opinion that the Land Law (Ireland) Acts contain no provision rendering it obligatory upon the Court (in fixing the fair rent of a holding) to make or act upon the assumption indicated in the requisition, and (in any event) being of opinion that the definition embodied in the requisition was ambiguous. We were of opinion that the fair rent of the holding should be fixed at £18, but at the request of counsel for the landlord we agreed to state this case for the consideration and decision of Her Majesty's Court of Appeal in Ireland.

"The question for the consideration and decision of Her Majesty's Court of Appeal in Ireland is:—

"Whether, in fixing the fair rent of the holding, the Court is bound to assume and to fix the fair rent upon the assumption (*a*) that the annual sum referred to in sub-section (1) (*a*) of section 1 of the Land Law (Ireland) Act, 1896, is the annual sum at which, after all the circumstances of the case, holding, and district, have been taken into consideratien, the holding in the landlord's hands might reasonably be expected to let from year to year to a solvent and prudent tenant who desired to derive a benefit from the occupation of the tenement, and not from its sale; (*b*), that the fair rent of the holding referred to in sub-section (1) (*g*) of section 1 of the Land Law (Ireland) Act, 1896, is the annual sum referred to

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in sub-sect. (1) of the same section less by a reasonable allowance in respect of the sum which would represent the present annual value of the improvements made by the tenant."

The case stated bore the following indorsement placed upon it by the tenant's solicitor:—"The tenant having this day informed us that he is quite unable to bear the costs of appearing in this case, and having in consequence thereof declined to instruct us, we are unable to alter or approve of this draft on his behalf.

"(Signed), JOSHUA E. PEEL. 26 July, 1998."

Ronan, Q.C., and *Campbell, Q.C.* (with them *C. Murphy*), for the landlord:—

The "fair rent" of a holding is to be ascertained by examining the physical properties of the piece of ground therein comprised. In ascertaining this amount no difference is to be made by reason of the fact that the tenant is in occupation. No deduction is to be made from the gross fair rent in respect of "the occupation interest": *Markey* v. *The Earl of Gosford* (1). No doubt the right of the sitting tenant is dead as "occupation interest," but the Land Commission must be careful not to let it come into consideration "as one of the circumstances of the case." "The circumstances of the case" do not include matters personal to the tenant: *Lanyon* v. *Clinton* (2), *per* Walker, C. It would be mere trifling to say that this "occupation interest" is not to be taken into account under the words "interest of the tenant," but that it may be considered as one of "the circumstances of the case."

The question intended to be raised by the case stated is whether the fair rent of a holding is one sum when fixed between a landlord and a "sitting" tenant, and another sum when fixed between a landlord and an incoming tenant. If the Court does not consider the form of the question satisfactory it can be amended, or sent back to the Land Commission. The same point of law would be

(1) 31 Ir. L. T. R. 37. (2) [1895] 2 I. R. 150.

raised by putting the question in either of following forms:— "Has the gross fair rent in this particular case been reduced by an illegal consideration"? or "that the annual sum to be ascertained under the Act of 1896, section 1 (*a*) should not include any amount solely referable to the fact that the holding is in the occupation of a tenant."

[They also referred to *Curneen* v. *Tottenham* (1).]

There was no appearance for the tenant.

Cur. adv. vult.

Feb. 22.

FITZ GIBBON, L. J.:—

This matter has come before us upon a case stated by the Land Commission, on the application of the landlord, under the Land Act, 1881, sect. 48 (2), which requires the Commission to state such a case in respect of any question of law arising in a proceeding pending before it, unless it considers the application frivolous and vexatious. The jurisdiction is strictly limited to questions of law; we are bound to see that we do not overstep our lawful limits, and the course of the present proceeding makes it specially incumbent upon us to be cautious in this instance. The holding in question was subject at the passing of the Act of 1881 to a rent of £29 6*s*. 6*d*. By an order of the Land Commission of May 12, 1883, the "fair rent" was judicially fixed at £22 10*s*. The tenant having applied to fix a fair rent for a second statutory term, a Sub-Commission by order of February 18, 1897, fixed the amount at £16 13*s*. 11*d*. The landlord served notice for a re-hearing by the Land Commission, which took place on May 5, 1898, when the contention was put forward which has led to the statement of the case; judgment was reserved in this and in eight other cases on the same estate, in which the landlord's counsel put forward the same contention, and on June 6, 1898, judgment was delivered, declining to accede to the requisition of the landlord's counsel, for reasons to which I shall presently refer, but the case states that the Land Commission were of opinion that the fair rent of the holding should be fixed at £18, being £1 6*s*. 1*d*. more than the amount estimated by the Sub-Commission.

(1) [1896] 2 I. R. 37, 356.

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The case is endorsed with the following memorandum signed by the tenant's solicitors:—"The tenant having this day informed us that he is quite unable to bear the costs of appearing in this case, and having in consequence thereof declined to instruct us, we are unable to alter or approve of this draft case on his behalf."

Therefore, as against the tenant, we are proceeding *in absentia*, and the duty of seeing to the just interests of an absent party is enhanced by the further statement which is contained in the case, paragraph 6:—"We do not think it necessary to state the conflicting evidence which was given on behalf of the landlord and tenant respectively, as this case is conversant solely with a question of law of general application." We are thus warned that any answer which may be given on this undefended case, upon hearing the landlord's side only, is intended and believed to be generally applicable to an unknown number of people, who have had no opportunity of being heard. Therefore it is our plain duty to see that we give no answer which can, under any circumstances, be dependent upon facts or evidence. In short, the question cannot be answered at all unless it is a universal legal maxim, axiom, or truism, applicable to every possible state of facts, independently of any possible evidence.

But furthermore, to be anything more than an abstract ques-question, or mere "moot," which we ought not to answer, we must see that an answer will affect the rights of the parties to the proceeding in the particular case. How does this appear? On the landlord's application, the case has been reheard, judgment has been delivered, and the Land Commission has declared its opinion that the fair rent of the holding should be fixed at £18. The case does not state whether or how, or if at all by how much, that conclusion of the only matter at issue can be, or is to be, affected or reopened, according as the supposed "question of law" is answered in the affirmative, or in the negative, or is not answered at all; nor is it stated that the Land Commission, in fixing £18 as the fair rent, was affected at all, or if at all in what direction, by declining to consider the case in the manner required by the landlord. This alone would be an insurmountable objection, in my opinion, to answering the

question, but it is not the only one, and as it might, perhaps, be regarded as being technical or formal, I do not further insist upon it.

The requisition to which the Land Commission declined to accede is embodied, *totidem verbis*, in the question submitted to this Court, viz. whether in fixing the fair rent of the holding the Court (meaning the Land Commission) is bound to assume and to fix the fair rent upon the assumption (*a*) that the annual sum referred to in sub-sect. (1) (*a*) of sect. 1 of the Land Act, 1896, is the annual sum at which, after all the circumstances of the case, holding, and district have been taken into consideration, the holding in the landlord's hands might reasonably be expected to let from year to year to a solvent and prudent tenant who desired to derive a benefit from the occupation of the tenement, and not from its sale: (*b*) that the fair rent of the holding referred to in sub-sect. (1) (*g*) of sect. 1 of the Land Act, 1896, is the annual sum referred to in sub-sect. (1) (*a*) of the same section, less by a reasonable allowance in respect of the sum which would represent the present annual value of the improvements made by the tenant.

This latter assumption (*b*) seems to be only a corollary to assumption (*a*), or at least to be dependent on it, and I shall therefore confine my remarks to assumption (*a*).

The Act of 1896 may also be eliminated, because the annual sum referred to in sect. 1, sub-sect. (1) (*a*), is "the annual sum which *should be the fair rent* of the holding," on a certain assumption as to improvements only. What "should be the fair rent" under this sub-section (save as to improvements) must still be determined under the Act of 1881, section 8 (1). On this point I have only to repeat what I said in *The Queen* (*Gosford*) v. *The Land Commission* (1): —"It appears clear that the Land Commission is still to exercise the same jurisdiction which was conferred upon it by the Act of 1881, sect. 8, and that the sum which has been called 'the gross fair rent' is still to be ascertained and determined by the Land Commission, under the Act of 1896, as under the Act of 1881, by a similar process, and in a similar manner, and all that the Act of 1896 has done is to require that any deductions made from *that sum* shall be specified, and that certain of the

(1) *Ante*, p. 420.

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materials used in ascertaining it shall be stated." It is "that sum," before any deduction, that is really in dispute here, and the Act of 1896 leaves its determination as it was before.

Thus the question put to us upon this case as a question of law, is seen really to be a question as to the mode in which the Land Commission is to determine fair rents in general. It is a question whether, in order to determine the fair rent payable by each occupying tenant to his landlord for his holding, the Land Commission is bound, as matter of law, and in every case, to make the assumption, contrary to the fact, that there is no tenant in occupation at all, and that the land is "in the landlord's hands." Not being a valuator, I have not the smallest idea—if I had any jurisdiction to determine, or even any right to express an opinion—whether in any given case the fair rent of an occupied holding should be the same as that of so much vacant land. If I were to hazard a guess, it would be that it should be sometimes more, sometimes less, but certainly not always, as matter either of law or of fact, necessarily the same. But I cannot pursue this speculation, for I cannot, for myself, reconcile my considering it at all with the Act of 1881, sect. 48 (2):—"No appeal from the Land Commission to the Court of Appeal *shall be permitted* in respect of any decision as to the amount of fair rent, or any question of value."

It is obvious that nothing can be referred as "a question of law" on a case stated, which this Court is forbidden to decide upon an appeal; and, for myself, I can not make anything out of the question on this case except "amount of fair rent," or "value," or both. The materials to be considered in fixing a fair rent, or even the mode of proceeding to fix it, may no doubt be the subjects of questions of law. But does this question involve these? The Act of 1881, sect. 8, prescribes what *the Land Commission* is to do, to what *it* is to have regard, and what *it* is to consider, before *it* determines what *is* the fair rent to be paid by the tenant to the landlord, for the holding which is the subject-matter of the particular proceeding. The question before us assumes, and in fact it states, that this section has been complied with, and the Land Commission has judicially declared its opinion that the fair rent of the holding is £18. None of the evidence is set forth, because it is stated that it is

immaterial to "a question of law of general application." Whether we answer "yes" or "no"—whether we say that the Land Commission is to base its estimate of the fair rent on a false assumption or not—we do not know, and unless we illegally act as valuers we cannot answer, whether the £18 will be more, or will be less, or will remain the same, in the case before us; still less can we say, or see, how the like assumption would operate, if at all, upon what, in the judgment and under the exclusive responsibility of the Land Commission, might be declared otherwise to be the fair rent in any other case. If we did venture to intrude upon this forbidden topic, we have the judgment of Meredith, J., from which it appears to be as contrary to his view of his duty, as it is to our view of the law, that any specific allowance or deduction from the so-called "gross fair rent" for any so-called "occupation interest" can be made; and therefore it does not seem even likely that an affirmative answer to the question on the case would increase the £18 by any sum whatever.

If we were to treat the question strictly according to the letter, as simply asking whether the Land Commission was bound in every case to make a false assumption of fact as the basis for determining a fair rent, we might answer it at once in the negative, because the Act of 1881, sect. 8 (1), prescribes no such assumption, and, on the contrary, it requires the Court to fix the fair rent between two litigating parties, one of whom is necessarily in every case an occupying tenant, and directs that regard shall be had to their respective interests, and that all the circumstances of the case, holding, and district shall be considered. If it had been intended that what I may call a theoretical method of fixing the amount of the fair rent should be adopted, Parliament should have said so. Precedents might have been found in the Valuation Act, 1852, sect. 11, either for making the estimate "with reference to the average prices of agricultural produce, taking into consideration all peculiar local circumstances, and assuming all rates, taxes, and public charges to be paid by the tenant"; or, on the other hand, for fixing "the rent for which, one year with another, the holding might in its actual state be reasonably expected to let from year to year, the probable annual average outgoings being paid by the tenant." But when Parliament deliberately directed that the

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fair rent should be fixed and determined by the Land Commission, and by it alone, in the manner prescribed by the Act of 1881, sect. 8, it cannot be made a question of law, for the decision of this Court, whether the Land Commission is bound, in every case, to exercise its prescribed and exclusive jurisdiction, and to arrive at the fair rent, by making an assumption contrary to the fact, and not mentioned in, or even consistent with, the statute.

Pressed with this difficulty, the landlord's counsel proposed to change the question. Mr. Ronan tried to put it in the form—"whether the 'gross fair rent' in the particular case had been reduced by an illegal consideration?" But we do not know whether it has been reduced at all, nor how it has been arrived at, and we have neither the means nor the power to arrive at it ourselves. Mr. Campbell tried to put it in the form—"that the annual sum to be ascertained under the Act of 1896, sect. (1) (*a*), should not include any amount solely referable to the fact that the holding is in the occupation of a tenant." But we do not know whether it does or does not include any such amount; and on the judgment of Meredith, J., we have not even any reason to believe that it does. Whether it does, or does not, we cannot tell whether such a fact, in any given case, should increase, or should diminish, or should leave unaltered, what the Land Commission alone can determine to be "the fair rent," and we are told that our answer is to be of general application.

But having regard to the fact that this case was stated in the very terms of a written requisition, presented by the only party who has appeared before us, and that the case tells us that the question is independent of evidence, and that the answer is to be of general application, I hold that we can not consider any alteration of the case at all.

While I agree with the evident proposition which was the first ground of the refusal of the Land Commission to accede to the requisition, namely, that the Land Acts contain no provision rendering it obligatory on the Court to make or to act upon the assumption indicated, I also agree with the second ground—that the definition embodied in the requisition is ambiguous. From this ambiguity it results that a simple negative can not be given without giving some colour to the contention that the fair rent to

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be fixed in this, or indeed in any case, should not be the same which it would be if the assumptions indicated were made. No answer can therefore be safely given, even if it could be lawfully given, and furthermore no answer could, in our opinion, lawfully be of general application. Therefore, in my opinion, we should declare that the question stated does not appear to be a question of law which it is within our jurisdiction to determine; that it is an abstract question, any answer to which would not necessarily affect the determination of the fair rent of the holding in question, and could not be of general application to other cases; and that the question is ambiguous and indefinite; and therefore that this Court should decline to answer it.

I have studiously avoided expressing any opinion upon those matters, put forward in argument, which we decline to decide. To some of these I have already referred in my judgments in *Curneen* v. *Tottenham* (1), and in *The Queen* (*Gosford*) v. *The Irish Land Commission* (2). Having carefully re-read those judgments, in deference to Mr. Ronan and to Mr. Campbell, I see no reason, as at present advised, to qualify or to alter anything therein, when understood as intended.

Though declining to answer the question upon this case, I must emphatically express my opinion, that the Land Commission took the right course in submitting it. The landlord's counsel presented their requisition in good faith, and when they submitted it as raising a question of law in which their client was interested, in a shape which they believed might lead to a decision which would set right what is asserted to be a wrong, I commend the course which was taken in acceding to their desire to bring the case here. When the Act of 1881, section 48 (2), provides for the statement of a case in respect of any question of law, on the application of any party, unless the Land Commission consider the application frivolous and vexatious, I venture respectfully to express my full approval of the extension of this relief, even where the Land Commission may not be entirely satisfied that the question is one which can be satisfactorily answered as a question of law; always provided that the application to state it is not, in the

(1) [1896] 2 I. R. 37, 356. (2) [1899] 2 I. R. 399.

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words of the Act, "frivolous and vexatious." We have had, in times past, more instances than one of complaints and of dissatisfaction, and even of proceedings for *mandamus*, *certiorari*, or prohibition, which would have been avoided by a more generous exercise of the power of stating cases, and of permitting appeals. Speaking for myself, I am glad when any opportunity is availed of for reviewing our decisions here. Appeals are always interesting, and they are generally instructive, and though the present attempt to obtain the assistance of this Court upon the matter which is honestly believed to be at issue has failed, for reasons which we believe ourselves powerless to overcome, it is due to the Land Commission that I should express my approval of the course taken in facilitating that attempt.

WALKER, L.J. :—

The Land Commission has power, when a question of law arises between litigants in a fair rent proceeding, to state a case for this Court and ask it to decide such question of law between the litigants, with a view to the ascertainment of their rights.

In the present case Mr. Justice Meredith has decided—(*a*) that the fair rent is £18 ; (*b*) that in fixing that rent, nothing has been deducted for occupation interest. He has also refused to accept as the absolute and unalterable synonym for the gross fair rent, the definition or standard stated in the question, viz. "the annual sum at which, after all the circumstances of the case, holding, and district have been taken into consideration, the holding in the landlord's hands might reasonably be expected to let from year to year to a solvent and prudent tenant who desired to derive a benefit from the occupation of the tenement, and not from its sale."

Having regard to what Mr. Justice Meredith has decided, I think the proposed question is purely an abstract one, which we ought not to answer. It will decide nothing between the litigants. It has the additional infirmity of being vague and ambiguous; and Mr. Campbell, feeling that, proposed two amendments of it, but we cannot, against the absent party, deal with any other question than the one submitted, and it seems to me that the two suggested ones are still more abstract in form than that put in the case.

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Walker, L.J.

The argument is that it must be taken against Mr. Justice Meredith, that something was necessarily allowed as a deduction to the tenant by reason of his being tenant, though he tells us the contrary. On the hypothesis of his judgment the question is, I think, an abstract one so far as regards the rights of the parties before us. We have no reason to suppose that the rent of £18 would be altered by one penny if the fair rent definition proposed were successfully pressed on Mr. Justice Meredith.

This shows that we are asked to decide some moot question. We are not the general advisers of the Land Commission for such purposes. Mr. Justice Meredith has told us the basis on which he has arrived at the fair rent, viz. by a simple adherence to the statute which, while it remains law, is as plain as can be, and must regulate the process.

The tenant whose fair rent is fixed not only is, but must be in actual occupation, not out of occupation, and the rent is fixed with the view of his continuing to occupy, "and thereupon," in the words of the Act, "the Court after hearing the parties, and having regard to the interest of the landlord and tenant respectively, and considering all the circumstances of the case, holding, and district may determine what is such fair rent." There is nothing in the first section of the Act of 1896 which alters this case, though provision is made for recording gross fair rent and deduction. In many instances there may be evolved from the process some element which can be stated to affect the amount, and which if it rests on a legal principle may form the subject of a case stated, but usually fair rent is the mere estimate of value, which the Court of Appeal cannot go into—a pure subject for an expert. The nature of the thing excludes the idea of mathematical certainty. One certainly ought not in working out the process, introduce into the circumstances of the case one circumstance absolutely contrary to the fact, and revise the rent on the basis of the tenant not being in occupation. It does not follow that a shilling is deducted because he is in occupation. For all we know, the rent may be fixed higher on that account in some cases; at all events, it is a domain which, by the Act of Parliament, we are excluded from entering upon; when a concrete case arises, stating figures which will affect the rights of litigants, we shall have a case to decide.

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I have thought it right, while declining to answer the question, to indicate plainly my opinion that the question proposes a guide vague and misleading and not warranted by the 8th section of the Act of 1881, or anything in the Act of 1896.

HOLMES, L. J. :—

If the question submitted to the Court were answered in the affirmative, it is doubtful whether it would have the effect of altering in any way the amount of the tenant's fair rent as fixed by the Land Commission, while it is certain that a rule would thereby be laid down applicable to all fair rent applications.

Not only would this be the result of the decision, but it was also the object of the landlord in asking the case to be stated. This appears clearly from the contents of the case and from the arguments of his counsel. I learn from the former, that both during the progress of the rehearing of the application before the Land Commission and also at its close, the Court was asked on behalf of the landlord to affirm a proposition which, converted into interrogative form, has become the question for our consideration and decision. The Court declined to accede to this requisition, being of opinion that the Land Law (Ireland) Acts contain no provision rendering it obligatory upon the Court (in fixing the fair rent of a holding) to make or act upon the suggested assumption, and being further of opinion that the definition embodied in the requisition was ambiguous. The case does not set forth the conflicting evidence given on behalf of the landlord and tenant respectively; nor is there anything exceptional in its omission. In framing documents of this kind, the statement of evidence is, as a rule, unnecessary and inexpedient; but there is generally found in them something to show the relevancy of the legal question to the matters in actual controversy between the parties. In the instance before us, for example, I should have expected to be told that the annual sum referred to in sub-section 1 (*a*) of section 1 of the Act of 1896, as ascertained by the Land Commission in the case of Blair's holding, was different from what it would have been if it had been ascertained upon the assumption mentioned; and I should also have expected a statement

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of the grounds of the difference, including any inferences of fact material thereto. No such information is supplied, and the explanation of its absence is that the "case is conversant solely with a question of law of general application."

The inference both from what appears in the case and from what is omitted from it, is that we are invited to give an opinion on an abstract question of law—a question that might be appropriately discussed at a reader's moot or in a legal treatise, but the consideration of which is not within the functions of this Court. Judicial tribunals in this country exist to adjust the rights and liabilities of parties to a lawsuit, and not to solve speculative problems. Where, as usually happens, the result of the litigation is a judgment, decree, or order, there is little danger of a Court exceeding this limit of its jurisdiction; but where it is empowered by statute to decide on a case stated by another authority, there is more risk of its passing from the concrete to the abstract. The 48th section of the Land Law (Ireland) Act, 1881, which confers the jurisdiction we are now asked to exercise, requires the case to be stated in respect of a question of law arising in a proceeding pending before the Land Commission. Of course this can only mean a question relevant to and affecting the result of the proceeding; and where the case not only fails to show such relevancy, but conveys that the object of submitting the question is to obtain a decision for general guidance, I am of opinion that it ought not to be entertained.

I hope, however, that in saying this, I shall not be misunderstood. I am not one of these who think it expedient to deal with every case that comes before a Court as if it only concerned the parties to it; and to decide it, if possible, upon some special feature to the exclusion of questions of general interest. It has not been thus that English law has been brought to a degree of certainty and uniformity which, amid the complex problems of modern civilization, could not have been attained by the most skilful codification. Our law reports have served for a code; and the value of the judgments therein contained depend upon the prudent courage with which legal principles are expounded. But these principles are treated in connexion with a concrete case; and the propositions formulated are pointed, limited, and controlled by the circum-

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stances to which they are applied. Hence it is that even if our Courts were at liberty to answer purely speculative questions, it would be hardly possible to do so with advantage.

The difficulty is illustrated by the case before us. Everyone is probably ready to admit that the Land Commission would be assisted in fixing a fair rent by knowing the sum at which the holding in the landlord's hands might be expected to let from year to year to a solvent and prudent tenant: therefore this is always a legitimate subject of investigation. There are doubtless cases in which the fair rent that ought to be fixed would correspond with the sum that would be arrived at on the assumption in the question submitted to us. But, if this be so, other cases can be easily conceived in which the result of acting on the assumption would be a rent unfairly high or unfairly low. Under these circumstances, what answer can be given that would be of general application? An affirmative or negative reply would be equally misleading.

This difficulty has not, I think, escaped the notice of the counsel for the landlord. At least it is remarkable that their able and elaborate arguments were directed to a proposition wholly different from anything suggested by the question submitted for decision. This proposition has been stated by them in various forms of language, but I think its substance was that the fact that the holding was in the occupation of the tenant was not a circumstance to be regarded in fixing the *amount* of the fair rent. A question framed upon a requisition of this kind would be simpler and perhaps easier to answer than that with which we are dealing; but it would be equally open to the objection that it is abstract in its character. It was probably raised and discussed before the Land Commission; but I can find nothing in the judgment of Mr. Justice Meredith to lead me to think that it was decided against the landlord. Indeed the train of his reasoning, and especially his emphatic declaration against deduction in respect of occupation interest (whether conscious or unconscious, disclosed or undisclosed) seem to indicate that the fair rent was fixed upon the basis contended for by the landlord's counsel. But whether this be so, or not, it is evident that the proposition discussed in this Court is widely different from that presented in the case. We have been

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pressed to send the case back for amendment. Such a course has been sometimes taken for the purpose of supplying deficiencies or removing ambiguities; but it could not be justified where the question is founded on a requisition of the landlord pressed by his counsel after its ambiguity was pointed out by the Judicial Commissioner, and where the tenant has declined to take any part in either preparing or discussing the case.

There are thus, in my opinion, three grounds on which this Court ought to decline to reply to the question submitted for consideration and decision:—

1. It is not asked for the purpose of settling any matter in controversy between the actual litigants, but with the object of laying down a rule for general application.

2. Its vague and ambiguous character makes it impossible for the Court to give it an answer which would either afford guidance in the present case or assistance in future litigation.

3. The only question argued on behalf of the landlord before this Court (where the tenant is not represented) has no resemblance to the question stated by the Land Commission at the landlord's request.

The view I take of the case rests on these grounds alone; and if other grounds have been suggested, I am not prepared to adopt them. In giving my reason for sending back the case without a decision, I have carefully avoided offering any opinion on the proposition discussed before us. Some of my observations in *The Queen* (*Gosford*) v. *The Irish Land Commission* (1) were quoted by Mr. Justice Meredith, and in the argument here. If I had cause for thinking that anything I then said has been misapprehended either by the learned Judge or even by counsel in this discussion, I should take this opportunity of making my meaning clear. But I do not think that I have been misunderstood, and there is therefore no need of explanation.

I fully concur in what Fitz Gibbon, L.J., has said as to the propriety of the Land Commission in stating this case.

Solicitor for the landlord: *Monroe.*

G. Y. D.

(1) *Ante*, p. 399.

Q. B. Div. 1899. April 26.

JOHN NOLAN FERRALL *v.* THOMAS CURRAN, THOMAS DELANY AND MARGARET DELANY (1).

(1888. No. 31.)

Practice—Ejectment on the title—Death of sole plaintiff, a tenant for life—Application by remainderman to be substituted as plaintiff—Ord. XVII., R. 4.

The plaintiff, as tenant for life under an indenture of marriage settlement executed on the occasion of his marriage in 1869, sued, in an action of ejectment on the title, to recover certain lands in the county of Mayo. During the pendency of the suit he died in the year 1895. His eldest son, as tenant in tail in remainder under the settlement, now applied to be substituted as plaintiff in the action:—

Held, that the applicant did not represent the interest of the plaintiff in the action; that there was no change or transmission of the interest of the plaintiff to the applicant; and, that the application must be refused.

MOTION on behalf of John Cecil Nolan Ferrall, that he be substituted as plaintiff in the action in place of the original plaintiff who had died, and that he be at liberty to continue the proceedings in his name.

The plaintiff sued in an action of ejectment on the title, to recover certain lands in the county of Mayo. The action was commenced in the year 1888, and the pleadings closed in the year 1890; since then no further step had been taken in the action. The plaintiff died in the year 1895. His eldest son now applied to be substituted as plaintiff in the action in place of his father. From the affidavits filed to support the motion, it appeared that the plaintiff sued as tenant for life under an indenture of marriage settlement executed on the occasion of his marriage in 1869. His eldest son, the applicant, was tenant in tail in remainder under the settlement. The delay in making the application was satisfactorily explained in the affidavit.

(1) Before MURPHY, and GIBSON, JJ.

Henry Monahan, in support of the motion :—

The interest of the applicant arises under the same instrument as that of the plaintiff. It is an interest in succession to that of the plaintiff. The application should be granted under Ord. XVII., Rule 4. If the motion is not granted, the applicant may be met by a defence under the Statute of Limitations in a new action.

M^c Gonigal, for the defendants :—

The applicant does not represent the interest of the plaintiff. He must sue in his own right. There has been no change or transmission of interest within the meaning of Ord. XVII., R. 4: *Hills* v. *Springett* (1); *Howard* v. *Howard* (2). The defendants rely upon a defence under the Statute of Limitations. If the motion is granted, they may be deprived of that defence.

THE COURT held that there was no change or transmission of interest within the meaning of Ord. XVII., R. 4, and refused the motion with costs.

Solicitor for the applicant: *John Garvey.*
Solicitor for the defendants: *A. B. Kelly.*

J. M^cG.

(1) L. R. 5 Eq. 123. (2) 30 L. R. I. 340.

Q. B. Div.
Probate.
1898.
Feb. 4, 8, 14.

FRENCH *v.* HOEY (1).

Probate—Grant of probate—Will and codicils—Republication of will referred to by date—Codicil not mentioned.

The testator made a will dated the 21st October, 1895, and a codicil thereto dated the 31st October, 1895. He made a new will, revoking all previous testamentary instruments, on the 18th November, 1896, but he revoked this last-mentioned will by tearing it on the 7th January, 1897. He then (15th January, 1897), made two codicils, one republishing the will of the 21st October, 1895, written on the same sheet of paper as that will, and referring to it as "my above-written will," and the other, stated to be a codicil to the will of the 21st October, 1895, making a few different bequests, but in all other respects confirming the same:—

Held, that the codicil of the 31st October, 1895, was not republished, and that probate should be granted only of the will of the 21st October, 1895, and the two codicils of the 15th January, 1897.

Burton v. *Newbery* (1 Ch. D. 234) explained; *Gordon* v. *Lord Reay* (5 Sim. 274) questioned.

Action to establish the will of John Hoey, deceased, dated 21st October, 1895, together with three codicils, one dated the 31st October, 1885, and two others, both dated the 15th January, 1897.

The action was brought by John Alexander French, one of the executors named in the said will as plaintiff, against the testator's widow and only child, and the Rev. J. E. O'Malley, the other executor therein named, who (though called on so to do) failed either to renounce probate or to join with the plaintiff in seeking to establish the will and codicils.

The evidence given at the trial is fully stated in the judgment of Mr. Justice Andrews. It was proved that the testator duly executed five distinct testamentary documents. He made a will, dated the 21st of October, 1895, leaving several legacies, amongst

(1) Before Andrews, J.

them many to charitable objects, and in certain events the residue of his real and personal estate to charitable objects. He executed a codicil to this will, dated the 31st October, 1895, whereby, in the event of his death within three months from the date thereof, or in the event from any other cause of the said charitable gifts becoming void, he gave the subject of the void bequests to the Rev. J. E. O'Malley absolutely. The testator made a new will, dated the 18th November, 1896, revoking all previous wills, leaving the same charitable legacies, with one or two additional, but giving the residue to his wife absolutely, and making provision for his daughter, if his wife should predecease him, and in this event leaving the residue in charity. This will concluded with a gift to the Rev. J. E. O'Malley, absolutely, of any charitable legacies which should fail, in the same manner as provided by the codicil of the 31st October, 1895. The testator revoked this will by tearing it on the 7th January, 1897, and on the 15th January he executed two more testamentary instruments, the first on the same sheet of paper as the will of the 21st October, 1895, republishing and confirming it as his "above written will," and the other on a separate sheet of a paper in the form of a codicil, stated "to be a codicil to my will, dated the 21st October, 1895," again revoking the will of the 18th November, 1896, making a few slight changes by additional or substituted legacies in the will of the 21st October, 1895, and concluding "in all other respects, I confirm my said will of the 21st October, 1895."

The testator died within three months from the date of the republication of his will of the 21st October, 1895, possessed of considerable real estate, and the charitable dispositions accordingly came within the provisions of the 16th section of 7 & 8 Vict. c. 97.

Stanley, Q.C. (with him *Dixon*), for the plaintiff:—

In a Court of construction, where the *factum* of the instrument has been previously established in the Court of Probate, the inquiry is pretty closely restricted to the contents of the instrument itself, in order to ascertain the intentions of the testator. But in the Court of Probate the inquiry is not so limited; for the intentions of the deceased as to what instruments shall operate as

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and compose his will, are to be there collected from all the circumstances of the case taken together: *Greenough* v. *Martin* (1); *Methuen* v. *Methuen* (2); *O'Leary* v. *Douglass* (3). The evidence of the witnesses, and the scheme of the several testamentary documents executed, show that it was the intention of the testator to revive the will of the 21st October, 1895, *plus* the codicil of the 31st October, 1895, adding the legacies given by the will of 1896. The testator made his first will, leaving charitable bequests with the residue going to charity. He was then informed of the weakness attaching to these bequests, and as far as the law allowed, he cured this weakness by the codicil of the 31st October, 1895. The same charitable bequests are given by the testator on each occasion. It would be strange to attribute to the testator an intention to revive a will containing charitable bequests, and not to revive the codicil which gave to them (so far as affecting land) the only legal protection known in the event of his death within three months.

Where a testator by a codicil confirms his will, the will together with all previous codicils thereto is taken to be confirmed: *Green* v. *Tribe* (4); *Gordon* v. *Lord Reay* (5); *Crosbie* v. *Macdoual* (6); *In the Goods of De La Saussaye* (7). In *Neate* v. *Pickard* (8) the testator made a will, then made a codicil thereto, both which he revoked by getting married; then he made a codicil confirming his will, but making no mention of the first codicil: yet the Court granted probate of the will with both codicils. To the same effect is *In the Goods of Samuel Yates* (9), which is not distinguishable from the present case.

In *Upfill* v. *Marshall* (10) the testator executed a will, and altered it by a codicil. He then republished the will by writing a memorandum on the original document, which, as here, referred only to the will and not to the codicil; yet the codicil was admitted to probate. That case was followed by *Wade* v. *Nazer* (11),

(1) 2 Add. 239.
(2) 2 Phill. 417.
(3) 3 L. R. Ir. 323.
(4) 9 Ch. D. 231.
(5) 5 Sim 274.
(6) 4 Ves. 610.
(7) L. R. 3 P. & D. 42.
(8) 2 No. Cas. 406.
(9) 27 Ir. L. T. 524.
(10) 3 Curt. 636.
(11) 1 Robertson, 627.

where a will, revoking all former wills, followed by a codicil, was republished by a second codicil which did not mention the first codicil, yet the first codicil was admitted to probate, notwithstanding that the will which was revived as of the date of the second codicil contained the revocation clause. These cases show that in the absence of language or acts pointing to a contrary intention, when a testator speaks of "his will," even though he specifies it by its date, he is to be taken as speaking both of his will and any codicils theretofore made. "The will of a man is the aggregate of his testamentary intentions, so far as they are manifested in writing, duly executed according to the statute": *Lemage* v. *Goodban* (1). "A codicil is, in its nature, not substantive, but adjective": *per* Fry, J., in *Green* v. *Tribe* (2).

Burton v. *Newbery* (3) dissents from *Gordon* v. *Lord Reay* (4), and has itself been observed upon in *Green* v. *Tribe* (2). In any event it is distinguishable from the present case. The codicil there was quite valid, and was admitted to probate; the only question was whether it was confirmed so as to give effect to the invalid gift which it contained. Suppose that the codicil of the 31st October, 1895, contained a gift to the attesting witnesses as well as the "O'Hagan clause," then *Burton* v. *Newbery* (3) would be an authority that the codicil would be valid, but that the gift to the attesting witnesses would not be validated by the confirmation.

[They also cited *M'leod* v. *MacNab* (5), *Follett* v. *Pettman* (6), Jarman on Wills, p. 157.]

Ronan, Q.C., and *P. C. Gaussen*, for the daughter of the testator (one of the defendants):—

The codicil of 31st October, 1895, had no testamentary force after it was revoked by the will of 1896, and could not be revived by the testator without being mentioned. Neither of the codicils of the 15th January, 1897, makes any mention of the

(1) L. R. 1 P. & M. 57.
(2) 9 Ch. D. at p. 238.
(3) 1 Ch. D. 234.
(4) 5 Sim. 274.
(5) [1891] App. Cas. 471.
(6) 23 Ch. D. 337.

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codicil of the 31st October, 1895, and that which is written on the will of the 21st October, 1895, is expressly limited to "my above-written will." It was decided in *Burton* v. *Newbery* (1) that a codicil which refers to a will of a particular date, does not make effectual a previous codicil which was otherwise inoperative; because in order to incorporate a paper not testamentary, there must be a distinct reference to it: *Follett* v. *Pettman* (2). The two codicils of the 15th January, 1897, form part of the same transaction. They are to be taken as one, and they show no intention to revive the codicil of the 31st October, 1895. The words used in one, "my above-written will," exclude the codicil of the 31st October, 1895, and give the true interpretation of the phrase in the other, "I confirm my said will of the 21st day of October, 1895." The effect of the words, "my above-written will," is to negative any intention to set up the codicil of the 31st October, 1895, which, apart from these words, might possibly, on the authority of some of the cases cited, be inferred from the confirmation of the testator's will of the 21st October, 1895, describing it merely by its date.

The onus is on the person setting up the codicil in a case where its revival is sought to be established: *In the Goods of Reynolds* (3). In *Gordon* v. *Lord Reay* (4) no reasons are given for the decision. In any event, the codicil there was ineffectual only by the Act of Parliament; the intention of the testator to revive it was plain. So too in *Neate* v. *Pickard* (5), the testator did not intend to revoke the codicil which was held to be revived. But in the present case, the frame of the will of 1896 makes it plain that the testator knowingly revoked and rendered null the codicil of the 31st October, 1895. The intention to revive it should therefore be clearly and unambiguously expressed.

[They also cited *In the Goods of Spotten* (6), *Utterton* v. *Robins* (7), *In the Goods of Truro* (8), *Guest* v. *Willasey* (9).]

(1) 1 Ch. D. 234.
(2) 23 Ch. D. 337.
(3) L. R. 3 P. & D. 35.
(4) 5 Sim. 274.
(5) 2 No. Cas. 406.
(6) 5 L. R. Ir. 403.
(7) 1 A. & E. 423.
(8) L. R. 1 P. & D. 201.
(9) 3 Bing. 614.

ANDREWS, J.:—

The question in this case is whether a codicil dated the 31st October, 1895, to the will of the late John Hoey constitutes part of his testamentary dispositions, and ought to be admitted to probate.

The testator made a will dated the 21st October, 1895, whereby he revoked all previous testamentary dispositions, and, after bequeathing a life annuity of £200 to his wife, and a number of legacies, some of which were charitable, he gave the residue of his property, real and personal, to the Rev. John Edward O'Malley and John Alexander French, whom he afterwards appointed his executors, upon trust to sell and convert into money to be held upon certain trusts which in certain events would not exhaust all the moneys; and he then bequeathed the residue of the said moneys to the Rev. John Edward O'Malley, or the Parish Priest for the time being of St. Agatha's, Dublin, to be applied for such charitable purposes in Ireland as the residuary legatee should think most deserving.

The testator on the 31st October, 1895, made a codicil to this will (which is the codicil in question), referring to it by date, and in the event of his death, within three months from the making of his will, or, in the event from any other cause of any of the charitable bequests made by his will being or becoming void, he gave the subject of the void bequests to the Rev. John Edward O'Malley absolutely. This was the entire codicil.

The testator made a new will, dated the 18th November, 1896, by which he revoked all previous testamentary dispositions, and bequeathed legacies which he had bequeathed by his will of the 21st October, 1895, and also made a number of additional pecuniary bequests, and gave the residue of his real and personal estate to the same trustees whom he again appointed his executors, upon trust to sell and convert into money, and, subject to the payment of his funeral and testamentary expenses and debts, and the legacies and annuities thereinbefore bequeathed, he directed his trustees to hold the residue of the said moneys in trust for his wife absolutely. He then made provisions in favour of his daughter, in the event of his wife dying in his lifetime, and (as in certain events a residue would remain not thereinbefore disposed of) he again gave the

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residue of the said moneys to the Rev. John Edward O'Malley to be applied to such charitable purposes in Ireland as he should think most deserving; and he then repeated in nearly the same terms, the provisions of the codicil of the 31st October, 1895.

On the 7th January, 1897, the testator had an interview with his solicitor, Mr. French, at which he gave instructions for a change in his testamentary dispositions, and tore his signature off the will of the 18th November, 1896, with the intention of revoking it as was shown by the evidence given at the trial; but any question which could have been suggested respecting this revocation was set at rest by what followed. On the 15th January, 1897, he executed a duly attested testamentary instrument written after the end of his will of 21st October, 1895, and on the same paper, in these words:—"I, the above named John Hoey, hereby republish and confirm my above written will this fifteenth day of January, one thousand eight hundred and ninety-seven"; and immediately afterwards on the same day he executed a duly attested codicil, dated the 15th January, 1897, which began in these words:—"I, John Hoey . . . . hereby declare this to be a codicil to my will dated twenty-first October, one thousand eight hundred and ninety-five." He proceeded by this codicil to revoke his "will dated the eighteenth day of November, one thousand eight hundred and ninety-six," and he then bequeathed certain legacies which had been given by that will and were not given by the will of the 21st October, 1895, and, amongst other dispositions he bequeathed to his wife a life annuity of £100, which he expressed to be "in addition to the annuity of £200 bequeathed to her by my said will." He revoked a bequest of £500 "given by my said will of the twenty-first October, 1895," to his niece Emily, and in lieu thereof bequeathed her a legacy of £300; and he concluded in these words, "and in all other respects I confirm my said will of the twenty-first day of October, one thousand eight hundred and ninety-five, in witness whereof, I, the said John Hoey, have to this a codicil to my last will set my hand this fifteenth day of January, 1897."

It will thus be observed that the question to be determined is not whether the codicil of the 31st October, 1895, was revoked by the testamentary instruments executed on the 15th January, 1897,

or either of them, but whether that codicil which had been revoked by the will of the 18th November, 1896, was revived by those instruments, or either of them. Now, the 22nd section of the Wills Act of 1 Vict. c. 26, enacts that "no will or codicil or any part thereof which shall be in any manner revoked shall be revived otherwise than by the re-execution thereof, or by a codicil executed in manner hereinbefore required, *and showing an intention to revive the same.*" If the codicil of 31st October, 1895, was revived its revival must have been effected by the instruments executed by the testator on the 15th January, 1897, or one of them. It is no doubt true as a general rule that the word "will," when used without limitation of its meaning, includes all the testamentary papers which, together, make up the whole of the testator's testamentary dispositions, and therefore includes codicils; but it may also be used in a restricted sense, so as to be applicable only to the instrument called the "will," as distinguished from a codicil. I shall assume that the word "will" may, under certain circumstances, have its largest signification, and include a codicil or codicils, even though it be referred to as a will of a specified date; but to effect by a subsequent codicil the revival of a codicil which stands revoked, the subsequent codicil must, by the express enactment of the 22nd section of the Wills Act, show an intention to revive it. When the question in any particular case is a question of intention, I think it not only legitimate, but desirable to examine closely and carefully the document and facts relating to the case in hand, and consider what they disclose before embarking in an examination, and consideration of decisions in other cases, the documents and facts relating to which are frequently more or less different. An omission to adopt this course may involve the risk of applying to the case in hand decisions in cases of a different character, and with different surroundings.

Now, taking the first instrument executed by the testator on the 15th January, 1897, on the same paper as his will, I fail to find any intention whatever in it to do more than revive his will of the 21st October, 1895, at the foot of which it is written. I am wholly unable to construe the words "my above written will" as meaning, or intended to mean anything more than they actually and specifically describe; and the argument in favour of the

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revival of the codicil of the 31st October, 1895, touched so lightly on the effect of this first instrument, and so candidly recognised the difficulty of extending it to a revival of that codicil, that I think it unnecessary to dwell longer on the effect of this first instrument, whether it is to be called a re-execution of the will of 21st October, 1895, or a codicil to that will. I turn then to the second instrument of the 15th January, 1897, which is a codicil properly so called. Now, it appears from the evidence given at the trial that at the interview between the testator and his solicitor Mr. French on the 7th January, 1897, when the latter received the instructions upon which he prepared the instruments which were afterwards executed on the 15th, that both the will of the 21st October, 1895, and the will of the 18th November, 1896, were before the testator, and were looked over by him; and I think it impossible to come to the conclusion that he was not aware of their contents. He both intended to revoke, and did revoke the will of the 18th November, 1896, but a number of dispositions which he had made by it he wished to restore, and did restore by the codicil of the 15th January, 1897, which was prepared from his instructions. The will of 18th November, 1896, contained, as I have already mentioned, a clause almost in terms identical with the codicil of the 31st October, 1895. There is no restoration of this clause, and no reference to it or its object, in any part of the codicil of 15th January, 1897. This codicil was executed immediately after the first instrument by which he revived his will of the 21st October, 1895, and in that first instrument the testator used the words "I . . . . hereby . . . confirm my above written will," meaning, in my clear opinion, as I have already intimated, the will of the 21st October, 1895, and that only. Almost contemporaneously, and as part of the same transaction, he executed the codicil of the 15th January, 1897, and in the commencement of it he declares it to be a codicil to his "will dated the 21st October, 1895," and in the next sentence he revokes entirely his "will dated the 18th November, 1896," and, then, after restoring certain dispositions contained in that will, and making certain further dispositions, he concludes with the words I have already quoted, confirming his said will of the 21st October, 1895. Where then in this codicil of the 15th January, 1897, is the intention shown of

reviving the codicil of the 31st October, 1895, or making a disposition to the like effect? None of the dispositions in the codicil of the 15th January, 1897, disclose any trace of such an intention, and we are therefore left to look for it in the words by which he thereby refers to what he described as "my will dated the 21st October, 1895," and asked to find it there by interpreting these words as including the codicil of the 31st October, 1895, because the word "will" under certain circumstances is large enough to include a codicil, or codicils; and it is thought probable that the testator had the intention of reviving the codicil of the 31st October, 1895, which intention, unless it is to be found in the words I have quoted, he has in no way expressed. Thus we are invited to arrive at the conclusion that the testator intending to revive the revoked codicil of the 31st October, 1895 (the provision made by which formed part of the will of the 18th November, 1896, the whole of which he revoked, and although he was careful when he wished to restore other dispositions in that will to do so in express terms by the codicil of the 15th January, 1897), yet left his intention to restore the codicil of the 31st October, 1895, to be gathered from the words "my will dated" the 21st October, 1895, by which he aptly described that document alone. I confess that on the documents and facts of this case, unless constrained by distinct and binding authority, I am altogether unable to find in the codicil of the 15th January, 1897, anything whatever showing or indicating any intention whatever to revive the codicil of the 31st October, 1895. Let me now, however, advert to the principal authorities which were referred to during the exhaustive arguments by which I was assisted at the trial. In the cases of *Upfill* v. *Marshall* (1), decided in 1843, and *Wade* v. *Nazer* (2) decided in 1847, by Sir Herbert Jenner Fust, the question was one of revocation, and not one of revival. In both what was sought for was the intention of the testator. In the former a will of the 27th February, 1837, which disposed of real and personal estates on certain trusts, was followed by a codicil on separate paper of the 17th June, 1837, which made an alteration in the trusts, which was followed by a memorandum of the 10th July, 1838, written at the end of the

(1) 3 Curt. 636. (2) 1 Robertson, 627.

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will republishing it as the testator's last will. Parol evidence was received to show *quo animo* the memorandum was made, which was ascertained to be to make the will pass after purchased lands. The Judge held that the codicil was not revoked, and admitted it to probate with the will. In *Wade* v. *Nazer* (1) in determining a similar question, the Judge said he did not think he was precluded from considering the object which the testator had in view in re-executing in July, 1846, his will of 1843, and that object having been to render the attestation of the will free from question he applied the principle laid down in *Crosbie* v. *Macdoual* (2), that the re-execution of a will extends to and republishes the codicils, unless an intention to the contrary appears. Another principle was applicable in both cases, viz. that what is clearly done by express words ought not to be held to be undone by ambiguous words—a principle which does not apply where the question is one not of revocation, but revival—unless indeed it can be said that where there is a clear revocation there should be at least approximate clearness in what is relied on as a revival. With respect to the admission of parol evidence in the case of *Upfill* v. *Marshall* (3) the Judge referred to Lord Brougham's observations in *Guy* v. *Sharpe* (4), in which he said, with reference to the reception of extrinsic evidence to aid the construction of a written instrument—not to alter or control the sense—a purpose for which it can never be used, that there is a manifest difference between declarations of a testator, and proof of facts, and circumstances by the knowledge of which this Court may be placed in the same situation as the maker of the instrument, and be thereby better able to understand his meaning.

The next case relied on was *Gordon* v. *Lord Reay* (5), which has been disapproved of in a recent case, and in which Vice-Chancellor Shadwell's very brief judgment can scarcely be regarded as a satisfactory one. With respect to this case of *Gordon* v. *Lord Reay* (5), if the Vice-Chancellor intended (which he may not have done) to lay down the proposition, that inasmuch as a codicil is part of a testator's will, a second codicil, which

(1) 1 Robertson, 627.
(2) 4 Ves. 610.
(3) 3 Curt. 636.
(4) 1 My. & K. 589.
(5) 5 Sim. 274.

confirms the will, necessarily also confirms the first codicil, I would feel obliged to respectfully dissent from it as not being the law. In the case of *Burton* v. *Newbery* (1), decided in 1875, *Gordon* v. *Lord Reay* (2), came under the review of Jessel, M.R., who declined to follow it. During the argument before me, Mr. Stanley for the plaintiff, supporting the revival of the codicil of the 31st October, 1895, regarded *Burton* v. *Newbery* (1) as a distinct authority against him. The facts shortly were, that a testator, by a will made before the Wills Act, directed his residuary realty to be sold, and the proceeds divided between persons of whom A and B were two. By a first codicil made after the Wills Act, he directed certain real estate acquired after the date of his will to be sold, and the proceeds to be divided in the same way as directed by his will. This codicil was attested by A and B, who therefore could not take under it. He afterwards made another codicil, described as a codicil to his last will, dated the 7th December, 1837, and it was held that this second codicil did not operate as a republication of the first codicil, and that the gifts to A and B failed. In the case of *Green* v. *Tribe* (3), decided in 1878, Fry, J. examined the case of *Burton* v. *Newbery* (1). In *Green* v. *Tribe* (3) the question was one of revocation, not of revival. At page 234 of the report, the learned Judge said, "The general principle I take to be clear. On the one hand, where a testator in a codicil uses the word 'will,' abstractedly from the context, it will refer to all antecedent testamentary dispositions, which together make the will of the testator. . . On the other hand, it is equally clear that the testator may, by apt words, express his intention to revoke any codicil already made, and to set up the original will unaffected by any codicil. The question, therefore, which I have to consider, is whether the reference to the date of the original will is an indication of the intention to deprive all instruments other than the original will itself of any force—in fact, whether such a reference to a will effects a revocation of the antecedent codicils." He then referred to a series of cases, affording a clear negative answer. In one, *Smith* v. *Cunningham* (4), the Court held that the intention to

(1) 1 Ch. D. 234.
(2) 5 Sim. 274.
(3) 9 Ch. D. 231.
(4) 1 Add. 448.

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revoke must be clear and unequivocal. After referring to *Gordon* v. *Lord Reay* (1), he came to *Burton* v. *Newbery* (2), respecting which he said (p. 237), "It appears to me that the Master of the Rolls intended by this judgment to decide only that where recourse is had to a subsequent codicil to give vigour to an earlier one, a mere reference to the will by its date will not operate upon the earlier and inoperative codicil, so as to set it up, and that he did not intend (as has been argued before me) to lay down that the confirmation of a will referred to by its date would revoke a pre-existing and valid codicil." I agree in this interpretation of the judgment in *Burton* v. *Newbery* (2), which, in that view, seems to be accepted with approval by Fry, J., for he goes on to say, "The two classes of cases differ essentially. In the one, the earlier codicil has a proper force of its own; in the other, the earlier codicil must, if left to itself, fail. In the one class, the question is, does the later codicil revoke the earlier and operative one? in the other class you inquire, does the later codicil set up the earlier and inoperative one? To the one class of cases the principle applies that a clear disposition is not to be revoked, except by clear words; to the other class, this principle has no application," and he referred (as I also do) to the cases of *Doe* v. *Hicks* (3), and *Farrer* v. *St. Catherine's College* (4). It was on this principle, that the case of *Follett* v. *Pettman* (5) (in which also the question was one of revocation) was decided in 1883, and Kay, J., at page 342 of the report, referred to *Burton* v. *Newbery* (2) without disapproval, regarding it as having decided only what Fry, J. thought it was intended to do. A case of the class to which the present case belongs, was referred to in the argument before me, and is very like the present case. It did not undergo much argument, and the judgment is short, but it was decided by a very experienced and eminent Judge, then Sir J. Hannen. The case I refer to is *In re Reynolds* (6), in which the testator executed a will in 1866, and a codicil to it in May, 1871. In November, 1871, he executed a will which revoked all previous

(1) 5 Sim. 274.
(2) 1 Ch. D. 234.
(3) 8 Bing. 475.
(4) L. R. 16 Eq. 19.
(5) 23 Ch. D. 337.
(6) 3 P. & D. 35.

testamentary papers. In 1872 he executed a paper which was headed, "This is a codicil to the will of R., dated May, 1866." It concluded with the appointment of his son as executor of the will and codicil, and the attestation clause commenced, "Codicil to the will of R., dated May, 1866"; and it was held that the only intention to be gathered from the words of the codicil of 1872 was to revive the will of 1866, but not the codicil of May, 1871, which was excluded from probate. In the recent case of *M'leod* v. *MacNab* (1), before the Privy Council, in which Lord Hannen delivered the judgment, it was held that though a reference simply to the date of the earlier document was not sufficient in itself to restrict the confirmation to that particular document, yet other words and surrounding circumstances could and did convey such an intention.

I do not think it necessary to occupy time in making further references to the cases which were cited during the argument. None of them in my opinion in any way obliges me to hold in the present case, that the codicil of the 31st October, 1895, was revived, and my conclusion on the entire facts and circumstances of the present case and an examination of the authorities, is that not only is there nothing which can be legitimately referred to, showing any intention to revive the codicil of the 31st October, 1895, but that a distinct intention to leave it revoked may be well inferred, and I shall therefore declare that the testator's last will consists of the will of the 21st October, 1895, as revived by the memorandum at the end of it, dated the 15th of January, 1897, and also of the codicil on separate paper, dated the 15th of January, 1897, and I shall expressly declare that the revoked codicil of the 31st October, 1895, was not revived, and is not entitled to be admitted to probate, and I shall order that the plaintiff be at liberty to apply for probate to him, as executor, of the paper writings, so constituting the testator's last will. The plaintiff, Mr. French, will have his costs to be taxed as executor's costs out of the assets upon his extracting probate, the short-hand writer's proper charges will be allowed, and the defendants, Charlotte Hester Hoey, and Ellen Mary Hoey, will also have

(1) [1891] App. Cas. 471.

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their costs out of the assets, after probate is extracted and their costs are taxed.

Solicitor for the plaintiff: *J. A. French.*

Solicitor for Mrs. Hoey and Ellen Mary Hoey: *J. P. Lynch.*

G. Y. D.

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(1898. No. 2491.)

Practice—Parties—Joinder of defendants—Separate causes of action—Claim for damage—Action of libel—R. S. C. Ir. Order XVI., Rule 4—Law of Libel Amendment Act, 1888 (51 & 52 *Vict. c.* 64).

In an action for libel by the plaintiff against three defendants, A, B, and C, A, one of the joint owners, and B, the publisher, of the newspaper containing the libel, delivered a joint defence traversing all the allegations in the statement of claim, and pleading fair comment. C, the other joint owner of the newspaper and the writer of the libel, delivered a similar defence, and counterclaimed for a libel published by the plaintiff against him. At the trial, the jury found a verdict for the plaintiff, with £110 damages, and they apportioned the damages, by permission of the Judge, between the three defendants — £100 against C, and £5 each against A and B; they also found a verdict of sixpence damages on the counterclaim for the defendant C:—

Held, in the Queen's Bench Division, by Andrews and Boyd, JJ., and by the Court of Appeal, that the jury had no power to sever the damages, and that the judgments entered in accordance with the verdict should be set aside, and a new trial directed.

Held, also, by the Queen's Bench Division, that the damages were excessive.

NEW TRIAL MOTION on behalf of two defendants in an action of libel brought against three persons for the same libel and tried before Mr. Justice O'Brien and a special jury of the city of Dublin on the 28th and 29th June, 1898. The action was brought

(1) In the Queen's Bench Division, before SIR P. O'BRIEN, L.C.J., and ANDREWS and BOYD, JJ.

by the plaintiff W. N. Dawson, the editor of a newspaper called *The Armagh Standard*, and also a clerk in the office of the Clerk of the Union in that town, against three persons jointly—J. M'Clelland, a part-owner of an Armagh newspaper called *The Ulster Gazette*, J. G. Peel, a part-owner of same newspaper, and also the town clerk of Armagh, and W. H. Brayden, the printer and publisher of the same newspaper, for a libel contained in an article which appeared in that newspaper on the 29th January, 1898. The libel had reference to the plaintiff's connexion with the rival newspaper, *The Armagh Standard*, and the publication therein of articles written by him relative to an election for some municipal office in the town. It may be taken, for the purposes of this report, that the article complained of was scurrilous and abusive. The defendant Peel, who wrote the alleged libel, delivered a separate defence, with the usual traverses, a plea of no libel, and a plea that the alleged publications were fair comment upon matters of public interest, upon which the plaintiff himself in his own newspaper had also published articles containing serious charges of corruptness and impropriety against the defendant Peel, and counterclaiming for damages for libel contained in an article published by the plaintiff in *The Armagh Standard* of the 10th December, 1897. It may be taken for the purposes of this report, that this article was likewise scurrilous and abusive. The two other defendants delivered a similar defence, jointly, but no counterclaim. It is unnecessary for the purposes of this report to refer further to the nature of the libel which appears sufficiently in the judgments delivered. A letter (dated 16th February, 1898) was put in evidence at the trial from the defendant M'Clelland to the solicitors for the plaintiff, in which M'Clelland stated "I can only say that your client was not more annoyed than I was on reading the production" complained of.

At the close of the trial the following questions were left to the jury which, with their answers, are here subjoined:—

1. Is the article in the defendants' paper on the 29th January a libel?—*Answer*, Yes.

2. Is the defamatory sense imputed true?—No answer.

3. Was the article a fair comment on a matter of public interest?—*Answer*, No.

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4. The damages the plaintiff is entitled to?—*Answer*, £110 damages, viz. £100 against Peel, £5 against M'Clelland, and £5 against Brayden.

5. Is the article of the 10th December, the plaintiff's article, a libel?—*Answer*, Yes.

6. Was the said article of the plaintiff written and published in a defamatory sense?—No answer.

7. Was the said article a fair comment on a matter of public interest?—*Answer*, No.

8. The damages to which the defendant Peel is entitled?—*Answer*, 6*d*.

Upon these findings the jury, by the direction of the learned Judge, found for the plaintiff as against the defendant T. G. Peel with £100 damages, as against the defendant John M'Clelland with £5 damages, and as against the defendant W. H. Brayden with £5 damages, in the original action; and for the defendant T. G. Peel, on his counterclaim against the plaintiff, W. N. Dawson, with 6*d*. damages; and the Judge gave judgment for the plaintiff as against the defendant T. G. Peel for £100, as against the defendant John M'Clelland for £5, and as against the defendant W. H. Brayden, for £5, with costs in the original action against all said defendants; and for the said defendant T. G. Peel, on his counterclaim, for 6*d*., with legal costs if any; the Judge staying execution in the event of the defendants' lodging in Court the sum of £110, and serving notice of motion for a new trial, and certifying that it was a fit case for a special jury.

The defendants T. G. Peel and W. H. Brayden moved for an order that the verdict and judgment in the action and counterclaim be set aside, and a new trial had between the parties in the action and counterclaim, on the ground that the findings and verdict of the jury therein (save the findings on said counterclaim that the words complained of were a libel and were not fair comment) were against evidence and the weight of evidence, and perverse, and unsatisfactory, and on the ground that evidence properly admissible and tendered by the defendants was improperly rejected, and that evidence on behalf of the plaintiff was improperly admitted, and on the ground that the learned Judge had misdirected the jury, and that the findings in the action were inconsistent, and

that same and the judgment in the said action were wrong in law and unsustainable on the pleadings and evidence, and that the damages found for the plaintiff in the action were excessive, and were improperly ascertained and apportioned.

O'Shaughnessy, Q.C., *Campbell, Q.C.*, and *Bates*, for the defendants Peel and Brayden.

Gordon, Q.C., and *C. Murphy* (*Bushe, Q.C.*, with them), for the plaintiff.

Megaw appeared for the defendant M'Clelland, and said that unless the plaintiff was allowed to enter a *nolle prosequi* against his client, he would prefer the verdict to stand.

ANDREWS, J.:—

Feb. 28.

This action was brought by the plaintiff against the defendants jointly for the publication of a libel on the plaintiff contained in an article in *The Ulster Gazette* newspaper, of which the defendants Peel and M'Clelland were the proprietors, and the defendant Brayden was the printer and publisher. Peel was the writer of the article, and he filed a separate defence. M'Clelland and Brayden joined in the defence filed by them; but the joint responsibility of the three defendants for the libel for which the plaintiff sued was relied on by him, and admitted by them at the trial. The same solicitors and counsel appeared for the defendants at the trial, and in substance their defences were traverses, and pleas of no libel and fair comment. Peel also counterclaimed for a libel by the plaintiff on him, contained in a previous article written by the plaintiff and published in *The Armagh Standard* newspaper, of which the plaintiff was the editor. The jury severed the total damages of £110 which they assessed against the defendants thus, viz. £100 against Peel, and £5 each against M'Clelland and Brayden; and they assessed the damages of Peel against the plaintiff at sixpence. The learned Judge at the trial gave separate judgments, in accordance with these assessments. Peel and Brayden moved to set these judgments aside; M'Clelland appeared by counsel on the motion, and asked that the judgment against him should not be set aside, or that the course which the plaintiff's counsel submitted was open to

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him, of entering a *nolle prosequi* against M'Clelland and Brayden, and taking a judgment against Peel alone for £100, with the leave of the Court if necessary, should be adopted. Up to the making of Order XVI. of the rules of 1891, I regard it as having been settled that in an action against joint *tort-feasors* as such, the damages could not be severed, and assessed against the defendants separately, whether they united or severed in their defences, and, in my opinion, an action for libel was no exception to this rule. I regard it as having been also settled that in an action against joint *tort-feasors*, as such, although all were responsible to the plaintiff for the injury he sustained by the *tort*, the improper *motive* of one of the defendants only, as distinguished from his *acts*, could not be made a ground of damage against the other or others; and that if, in such a case, the plaintiff sought to get aggravated damages, by reason of such improper motive in one of the wrong-doers, he should sue that person alone. From a variety of authorities for these propositions, I think it sufficient to refer to the following, viz.: *Cocke* v. *Jenner* (1), *Heydon's Case* (2), *Onslow* v. *Orchard* (3), *Hill* v. *Goodchild* (4), *Robertson* v. *Wylde* (5), and *Clarke* v. *Newsam* (6).

Whether Order XVI., rule 4, has altered this settled law, has not, so far as I am aware, been ever decided in Ireland. That rule provides that all persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally, or in the alternative, and judgment may be given against such one or more of them as may be found to be liable according to their respective liabilities, without any amendment. The corresponding rule in England is also Order XVI. rule 4, in the English rules; and upon rule 4 and rule 7 of the same Order respecting the joinder of plaintiffs, the decisions in England appear to show that neither plaintiffs nor defendants can under those rules be brought before the Court in the same action where the causes of action in the plaintiffs, or against the defendants, are separate, and that rules 1 and 4 have relation only to the joinder of parties, and not of causes of action, and that claims for damages

(1) Hob. 66.
(2) 11 Rep. 5b.
(3) 1 Str. 422.
(4) 5 Burr. 2790.
(5) 2 M. & Rob. 101.
(6) 1 Ex. 131, 140.

against two or more defendants in respect of their several liability for separate *torts* cannot be combined in one action; see *Smurthwaite* v. *Hannay* (1), cited by the Lords Justices in *Sadler* v. *The Great Western Railway Company* (2), and the same case in the House of Lords (3); *Gower* v. *Couldridge* (4); and as regards rule 1, *Sandes* v. *Wildsmith* (5), in which *Booth* v. *Briscoe* (6) and *Gort* v. *Rowney* (7) were considered.

My opinion is in favour of holding that Order XVI. has not altered the settled law which I have referred to, but whether it has done so or not, I do not think that the present verdicts and judgments should be allowed to stand. If the libel which the plaintiff sued for stood alone, I do not think that the damages of £100 as against Peel could be regarded as so excessive as to require the verdict against him to be set aside on that ground; but no one can fail to be struck by the very remarkable disparity between the £100 assessed against Peel and the sixpence damages awarded to him for the previous provocative libel on him by the plaintiff, followed by other defamatory articles by the plaintiff prior to the libel by Peel, for which the plaintiff sued.

The plaintiff was the aggressor, and had repeated his aggressive conduct before Peel wrote the article for which the plaintiff sued. After reading the plaintiff's libel and the learned Judge's report of the evidence, I feel obliged to come to the conclusion, that if sixpence was a reasonable and proper measure of damages for the plaintiff's prior and provocative libel on Peel, the assessment of £100 damages against Peel for his libel on the plaintiff bore no reasonable proportion to the damages which the plaintiff could be justly or reasonably held entitled to against Peel. In making these observations I am not to be taken as expressing any opinion in favour, or justification, of the libel for which Peel was sued. I regard both the libels as highly censurable and deserving of strong condemnation; but the findings upon which the plaintiff who was the aggressor is to escape with sixpence damages for his highly censurable, and prior and provocative, libel, and Peel is to pay

(1) [1894] A. C. 494.
(2) [1895] 2 Q. B. 688, pp. 693–696.
(3) [1896] A. C. 450.
(4) [1898] 1 Q. B. 348.
(5) [1893] 1 Q. B. 771.
(6) 2 Q. B. D. 496.
(7) 17 Q. B. D. 625.

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£100 for his libel thus provoked, appear to me so entirely unreasonable and wrong that they ought not to be allowed to stand. There is a further reason for dissatisfaction with the verdict against Peel. By joining M'Clelland as a co-defendant the plaintiff was able to give in evidence the letter of 16th February, 1898, from M'Clelland to the plaintiff's solicitors, which could not have been given in evidence if Peel had been sued alone. Whether the jury were, or were not, told that this letter was evidence against M'Clelland only does not appear, but even assuming that they were so told, the effect of that letter as against Peel, might have been, and probably was, very considerable. The impression it would naturally produce and was intended to produce against Peel would not be easily got rid of by a jury, and I think it may go far to account for the comparatively excessive damages assessed against Peel.

If the view I am disposed to take as to the effect of Order XVI. is correct, I do not think that this is a case in which the Court should intervene to assist the plaintiff in sustaining the verdict against Peel, by now giving him leave, if it be necessary to obtain it, to remit the damages against the other defendants, or enter a *nolle prosequi* as regards them. If no such leave be requisite the plaintiff has not taken either of these steps, and has elected to await the decision of the Court on the motion to set aside the judgments given at the trial; and our decision now is that the verdicts and judgments at the trial be set aside, and that a new trial be had.

As regards the costs, neither side appears to have objected at the trial to the separate assessment of the damages, and, under all the circumstances of the case, we think that the parties respectively should abide their own costs of the trial already had, but that the plaintiff should pay to the defendants, Peel and Brayden, their taxed costs of this motion, and the argument thereon, including their costs (if any), of setting aside the judgments, and of their attendance to-day in Court.

The Lord Chief Justice has authorised me to state that he concurs in the order of the Court setting aside the judgments and directing a new trial, and also in the order as to costs, but as his Lordship agrees in holding that the damages against Peel are

excessive, he does not feel it necessary under the circumstances to pronounce any opinion as to the effect of Order XVI.

BOYD, J.:—

I also think the verdict and judgment in this case should be set aside, and a new trial granted. The action has been brought against three persons for the same libel, and the publication thereof by them jointly at the one time. The act complained of is the act of all, though one of them may have done more or greater wrong than the others, and in my opinion the damages should have been assessed generally against all, and not as in the verdict and judgment separately against each. The jury have found a verdict against one defendant for £100, and against the others for £5 each, and the judgment has been so entered. The plaintiff should have selected the party against whom he sought aggravated damages, and brought his action against him alone, and not have joined the others. Having joined the others, he could only recover joint damages for the gross amount of damages he had received from all: *Brown* v. *Allen* (1), *Hill* v. *Goodchild* (2), *Eliot* v. *Allen* (3), *Clark* v. *Newsam* (4); and it makes no difference that the defendants may have severed in their defences and pleaded separately: *Sir John Heydon's Case* (5), *Onslow* v. *Orchard* (6).

The judgment as entered is in accordance with the finding of the jury, and, in my opinion, is bad on the face of it.

The plaintiff, by bringing his action against the defendants, jointly has been enabled to give in evidence a letter written to him by one of the defendants (M'Clelland) to the serious prejudice of his co-defendant (Peel), and this letter, in my opinion, largely contributed to the amount of the verdict against Peel. Had the plaintiff brought his action against Peel alone this letter could not have been given in evidence. I think the plaintiff deliberately brought the action against the three defendants in order to be able to get this letter before the jury in order to aggravate the damages against Peel. Having done so he must now suffer the consequences.

(1) 4 Esp. 158.
(2) 5 Burr. 2791.
(3) 1 C. B. 18.
(4) 1 Ex. 131.
(5) 11 Rep. 5b.
(6) 1 Strange, 422.

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It must be remembered that the plaintiff was himself the aggressor, as he wrote and published on the 10th of December, 1897, the first letter which the jury have found was a libel. I have carefully read the letter, and in it the plaintiff grossly libelled Peel and others, and provoked the writing and publishing of the letter of which he complains, and in respect of which he has brought this action. It was natural to expect that the publication of this letter would produce a rejoinder; and accordingly, on the 29th of January, 1898, Peel wrote, and he and the other defendants published, a reply thereto; and it is of the publication of this letter the plaintiff complains in the action. Having written so libellously and offensively as he did in the letter of the 10th December, 1897, I do not think he has much right to complain of the letter of the 29th of January, 1898. The jury have awarded to Peel 6*d.* damages for the statements contained in the former letter, and I consider the amount awarded to the plaintiff in respect of the latter letter is out of all proportion to the amount awarded in respect of the second letter. In the case of *Harris* v. *Arnott* (1), the Lord Chief Justice stated:—"Upon the whole, taking the principle which must guide us in this matter, that a reasonable proportion must exist between the sum awarded and the circumstances of the case, I am clearly of opinion that the damages were excessive." I adopt this language in its entirety, and applying the principle so clearly enunciated I am of opinion that the verdict against the defendants is excessive, and should be set aside on this ground also.

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The plaintiff appealed (2).

Charles Murphy (with him *Serjeant Dodd*), for the appellant:—

We submit (1) that we are entitled to recover £100 damages from Peel, and £5 against each of the other defendants, and a

(1) 26 L. R. Ir. 74.

(2) In the Court of Appeal before LORD ASHBOURNE, C., and FITZ GIBBON, WALKER, and HOLMES, L.JJ.

joint judgment against the three for the costs. Prior to the Judicature Act in an action for a joint tort, a plaintiff could only recover joint damages; and if he thought he had a stronger case against one defendant, he must have brought a separate action. But an action for libel was different from other actions of tort, because in libel, where malice was a material element, it was always open to the jury to sever the damages. Since the Judicature Act, the plaintiff could join all the defendants, and get judgment against them according to their several liabilities: Order XVI., Rule 4; Chitty's Archbold (ed. 1879), p. 406. We could have brought separate actions, the defendants could have applied to consolidate them, and if the jury found against more than one defendant they must apportion the damages: section 5 of 51 & 52 Vict. c. 64.

[Counsel referred to *Frescoe* v. *May* (1); *Martin* v. *Kennedy* (2); *Colledge* v. *Pike* (3); *Gregory* v. *Cotterell* (4); and Mayne on Damages (5th edition), pp. 453, 569.]

(2) If we cannot get separate judgments, then we ought to get a joint judgment for £110 against the three: *Booth* v. *Briscoe* (5).

(3) We submit that the plaintiff may enter a *nolle prosequi* in respect of those against whom he has got the smaller damages, and take a judgment *de melioribus damnis* against the third defendant: *Rodney* v. *Strode* (6); *Mitchell* v. *Milbank* (7); or

(4) The plaintiff is entitled to enter a *remittitur* as to the smaller damages, and then the plaintiff may recover judgment for greater damages against all: *Johns* v. *Dodsworth* (8); *Sabin* v. *Long* (9); *Lowfield* v. *Bancroft* (10).

[On the question of excessive damages counsel referred to *Praed* v. *Graham* (11); *Harris* v. *Arnott* (12).]

Bates (with him *O'Shaughnessy*, Q.C., and *Campbell*, Q.C.), for the respondents Peel and Brayden:—

Order XVI., Rule 4, does not alter the liabilities of the defen-

(1) 2 F. & F. 123.
(2) 2 B. & P. 69.
(3) 56 L. T. (N. S.) 124.
(4) 22 L. J., Q. B. 217.
(5) 2 Q. B. D. 496.
(6) Carthew, 19.
(7) 6 T. R. 199.
(8) Cro. Car. 192.
(9) 1 Wils. 30.
(10) 2 Stra. 910.
(11) 24 Q. B. D. 53.
(12) 26 L. R. Ir. 55

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dants, or deal with the question of joinder of causes of action; it is merely a rule of procedure as to the parties to an action: *Smurthwaite* v. *Hannay* (1); *Sadler* v. *Great Western Railway* (2). The jury had no power to apportion the damages in an action of tort: *Sandes* v. *Wildsmith* (3); *Heydon's Case* (4); *Robertson* v. *Wylde* (5); *Clark* v. *Newsam* (6).

The damages were excessive, considering the small amount given on the counter-claim.

April 21. LORD ASHBOURNE, C.:—

This is an appeal from a judgment of the Queen's Bench Division setting aside a verdict and judgment for the plaintiff in an action of libel, and directing a new trial. The action was brought by the plaintiff against three defendants jointly for a libel alleged to have been published by them. The defendants Brayden and M'Clelland delivered a joint defence traversing everything, and pleading fair comment. The defendant Peel delivered a similar defence, and counterclaimed for a libel published by the plaintiff of him. The case was tried before O'Brien, J., and there was a verdict for £110 for the plaintiff, which the jury, in accordance with a suggestion of the Judge, apportioned between the three defendants as follows:—£100 against Peel, £5 against M'Clelland, and £5 against Brayden. The jury also found 6*d.* damages for the defendant Peel on the counterclaim. The defendants Peel and Brayden moved for a new trial on the ground that the damages were excessive, and that the jury had no power to sever the damages. The defendant M'Clelland took no part in this proceeding, and we are informed that he appeared on the new trial motion really in support of the plaintiff. The Queen's Bench set aside the verdict and judgment on both grounds (the Lord Chief Justice, however, reserving his judgment on the second point), and the plaintiff has appealed from that judgment. It is clear from the authorities that before the Judicature Act damages in an action of this kind should be assessed jointly against the three defendants, and the only question before the Court is whether,

(1) [1894] A. C. 494.
(2) [1896] A. C. 450.
(3) [1893] 1 Q. B. 771.
(4) 11 Rep. 5b.
(5) 2 M. & Rob. 101.
(6) 1 Ex. 131, 140.

having regard to the Orders under the Judicature Act in an action constituted like the present, it is possible to sever the damages. In my opinion Order XVI., Rules 4 and 5, do not alter the rights and liabilities as they existed at the time of the passing of the Judicature Act, in an action framed and carried on like the present, and the effect of these orders is to be found in their literal terms. The libel alleged being stated to be a joint one, and the three defendants being sued jointly, and a joint judgment sought against all, the verdict should have been a joint one. I am, therefore, of opinion that the verdict should be set aside upon this ground, and that there should be a new trial.

Upon the question of damages, the Judges of the Queen's Bench were very much struck by the disparity between the verdict for £110 awarded to the plaintiff for the libel upon him, and the verdict for 6*d.* to the defendant Peel for the libel complained of in the counterclaim. There is a great deal of persuasiveness and force in what Andrews, J., says as to the discrepancy between the respective amounts of these damages, and the fact that it was the plaintiff who commenced the attacks. But I decide the case upon the form of the verdict, and as there will be a new trial, I do not think it expedient or desirable that I should say anything on the question of the amount of damages.

FITZ GIBBON, L. J. :—

I concur. The first question is, in terms, one of form, but the form covers a very important question of substance. Before the Judicature Act, in an action against several *tort-feasors* sued jointly, the damages could not be severed, or assessed at different amounts, or separately, against different defendants, and I am not aware that an action of libel was excepted from this rule. The first question is whether this rule has been altered by Order XVI., R. 4, which provides that "All persons may be joined as defendants against whom *the right to any relief is alleged* to exist, whether jointly, severally, or in the alternative. And judgment may be given against *such one or more of the defendants as may be found to be liable*, according to their *respective liabilities*, without any amendment."

In my opinion the General Order applies only where some

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specific "right to relief is alleged." This right may be alleged against several defendants; and when so alleged, judgment "according to their respective liabilities" in respect of the *alleged right*, as proved by the plaintiff, may be given "jointly, severally, or in the alternative." But the only ground of complaint alleged in this action is a *joint* wrong committed by *all three* defendants. There is no allegation of any act committed by any one of them severally, or by any two of them independently of the third, and therefore the subject-matter of the liability for which judgment must be given is a joint wrong, and nothing else.

Smurthwaite v. *Hannay* (1) and *Sadler* v. *Great Western Railway Company* (2) appear to me to establish that no change has been made in the law which forbade the joinder of distinct claims by or against several persons, and which required each such separate claim to be made the subject of a separate action. Order XVI. and the rules under it do not alter the *liabilities* of defendants, and therefore no one defendant can now be made "jointly, severally, or in the alternative," liable for any damages to which he would not have been previously liable, and the only judgment which previously could have been recovered against *joint* wrongdoers was for the amount to which each and every defendant was liable with the others.

I am willing to assume that if one action was brought against three *tort-feasors*, alleging separate wrongful acts against each, and no objection was taken until after verdict, separate judgments might be given for the "respective liabilities." But what is sued for here is the joint tort only, and the "respective liabilities" for that must be joint and several liabilities of all and each of the defendants for the same amount of damages. The case is tested by what Mr. Murphy contended for. He argued that he was entitled to apply the old rule to the three *tort-feasors*, and to make each liable for the others as well as for himself; and he claimed judgment and execution against all and each of the three for £110. But the jury did not award £110 against any of them: they assessed £5 and no more against each of two, and £100, and no more, against the third, and they plainly gave exemplary

(1) [1894] A. C. 494. (2) [1896] A. C. 450.

damages against Peel only, because they did not hold the other defendants to be equally liable with him for his part in the libel. The findings, therefore, are inconsistent with an intention to give damages for the *joint* wrong, and the verdict cannot stand as an assessment of damages for the joint wrong, which alone was alleged. It is impossible to hold any one defendant liable for more than the jury found against him, and the only question is whether we can now enter several judgments against Peel for £100, and against each of the others for £5. I do not think that we can. The action was brought, and the trial proceeded, on the basis that all were answerable jointly, and it was only when he came to charge the jury that the Judge said that he would allow the damages to be assessed separately. Separate judgments could not stand consistently with *Sadler* v. *Great Western Railway Company* (1); and if the case goes to a trial again, as an action against the three defendants, the jury must be instructed that they can find only one verdict, and assess only one amount of damages, as against such one or more of the defendants as may be proved to have committed a joint wrong; and if a joint wrong is found to have been committed, all who joined in it must be equally liable for the full amount of damages arising from it. By joining the three defendants, the plaintiff has confined his claim to such relief as the jury may find him to be entitled to recover from all and every of the defendants. It is not for us to say how the jury may be affected, in fixing the amount of the joint damages, by considerations affecting the several defendants.

If the plaintiff gets less, as compensation, against the three than he might have got against one, he has only himself to blame for not having separately sued the most guilty party.

I disclaim any jurisdiction to interfere with the province of the jury by expressing an opinion, one way or the other, upon the amounts awarded. I cannot say that 6*d.* on the counterclaim was too little, or that £100 on the claim would have been too much, if we could deal with the case as between the plaintiff and Peel alone, and I cannot adopt the judgments of the Queen's Bench, so far as they deal with the amounts awarded by the jury.

(1) [1896] A. C. 450.

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WALKER, L. J. :—

I concur. I am not much impressed with the arguments founded on the amount of damages, because in actions for libel the discretion of the jury is so large that I should be slow to disturb a verdict on that ground.

On the other point I concur with the Lord Chancellor and Fitz Gibbon, L. J. It was settled law before the Judicature Act was passed that joint *tort-feasors* were jointly liable, and separate damages could not be assessed against them. The Judicature Act has not, in my opinion, altered the rights of the parties but only the procedure. Each joint *tort-feasor* was liable for all the damage sustained by the plaintiff. Then came Order XVI., R. 4, of the rules of 1891, which provides that "all persons may be joined as defendants, against whom the right to any relief is alleged to exist, whether jointly, severally, or in the alternative. And judgment may be given against such one or more of the defendants as may be found to be liable according to their respective liabilities without any amendment."

In this case the defendants were sued for a joint tort, and up to the last moment of the trial, when the jury came to assess damages, the cause of action was treated as a joint tort. Having regard to the course of the trial, it is impossible to assess the damages separately now, and for these reasons I am of opinion that there must be a new trial.

HOLMES, L. J. :—

I desire to have it clearly understood that I am not affirming the order for a new trial, on the grounds that the damages given against the defendant Peel are excessive, or that the damages awarded him on his counterclaim are inadequate. I express no personal approval of these findings, which it is somewhat difficult to account for; but having regard to the large discretion allowed to a jury in the assessment of damages in actions of libel, I do not think that the result in this case is so unreasonable as to call for the interference of the Court.

I am, however, of opinion that the verdict must be set aside for the other reason relied on by Mr. Bates.

It is an old and well established rule of law that when an action is brought against two or more defendants for a wrong which is alleged to have been brought about by their joint action, and when all are found to be liable, the damages must be assessed in one sum, and there must be a single judgment for this amount. Such judgment may be levied in its entirety from one of the defendants, or partly from one and partly from another; but they have no right to have the liability apportioned amongst them. This has never been regarded as a mere matter of practice or procedure. It is the necessary and logical result of the legal principles applicable to this kind of action. What the plaintiff is entitled to receive is a sum representing the damage that he has suffered from a single wrong inflicted by all. One defendant has no right to say that his contribution to the injury was smaller than that of the others. Small as it may have been, the wrong might not have been committed at all, if he had not taken part in it, and the plaintiff would be deprived of his manifest right to have each made liable to recoup him all his loss, if he were obliged to take a judgment for a portion of it against one defendant and a different portion of it against another. If this be the plaintiff's right, it must also be the right of the joint defendants. Summoned into Court to answer for a tort alleged to be the result of their combined action, they are prepared to defend themselves against a single demand of the plaintiff, and not to fight a cross battle as to contribution amongst themselves.

Now the present action is such a case as I have described. The statement of claim alleges that two of the defendants are the proprietors, and the third is the printer of a certain newspaper, and that they published in such newspaper the alleged libel. There is nothing whatever to suggest that the plaintiff is seeking to combine in the same suit three causes of action—one against each defendant—even if such a proceeding were legally permissible. There is nothing to convey that he desires to have damages assessed against them severally, even if the law allowed this to be done. Although before the statement of claim was delivered, the plaintiff was aware of all the circumstances connected with the publication, nothing is stated to show that one defendant was more responsible or more guilty than another. Two defences

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were delivered; but this evidently arose from the fact that one of the defendants desired to counterclaim. Both the defences are to the same effect, and all the defendants were represented at the trial by the same counsel and solicitor. The case was conducted upon the basis that all the defendants were equally responsible for the alleged libel, and until the Judge's charge, it did not occur to anyone that, if the jury found for the plaintiff, the damages would not be assessed in a single sum. I apprehend that by the rule of law to which I have referred, the result ought to have been the ascertainment of the full amount to which the plaintiff was entitled, and judgment therefor against all the defendants. It has been argued somewhat weakly that a libel is not like other torts, and that always in an action of this kind there might have been a severance of damages; but no authority for this proposition has been mentioned, and the express and apparently exceptional provisions of the 5th section of the Law of Libel Amendment Act, 1888, as to apportioning damages in consolidated actions, is inconsistent with it. The argument to support the suggested distinction is that in actions of libel the damages depend to a great extent upon the motives and conduct of the defendant, and that it would be unjust if the plaintiff were not entitled to recover from the most guilty defendant a larger sum than a jury would be willing to award against his more innocent colleagues. But the same observation applies to many other wrongs; and the injured person can always select as sole defendant the most culpable of the wrong-doers. It has also been argued that objection ought to have been taken at the trial to the apportionment of the damages, and that it now comes too late. This might have been so, if the action had been tried on the assumption that there should be a separate assessment against each defendant; but the contrary was the case. It was only in the course of the charge that the Judge said, of his own motion, that he would take upon himself the risk of directing the jury to apportion the damages. I am of opinion that it would be throwing an unreasonable responsibility on counsel if in such circumstances his client were to be held bound by his silence. The words of the Judge conveyed that what was being done might be subsequently challenged by either party; and it cannot be assumed that it was done by consent.

There remains the principal argument pressed by the appellant. It is contended that in such a case as the present, the old rule has been altered since the Judicature Act; and Order XVI., Rule 4, is relied on as justifying the verdict and the several judgments in this action. The rule in question is not easy to construe, and the recent English decisions have confined its operation within very narrow limits. It is enough for me to say that it has certainly no bearing on the subject now under discussion. I have pointed out that the statement of claim alleges a cause of action against three joint *tort-feasors* and nothing more. Under the old system of pleading, it would have been a good declaration against the defendants jointly; and there is nothing in the Judicature Act, or in the rules thereunder, to convert it into something different, or to attach to it a different legal consequence. It is said that the plaintiff might have combined in the one action three distinct claims against the defendants separately. I offer no opinion on this point, because this has not been done. Whatever is the construction of the rule, it does not enable the same words to have two inconsistent meanings. Assuming that it entitles a plaintiff to claim relief against three defendants either jointly, severally, or in the alternative, it does not entitle him to make only a joint claim; and when issue is joined on this basis, to say that a claim for several relief is also included.

As long as the action retains its present shape, I am of opinion that, if there is a verdict against all the defendants, there must be one assessment of damages against all; and that, therefore, a new trial is necessary. The plaintiff may in the meantime, no doubt, apply to amend; but I refrain from speculating as to the result of such an application (1).

Solicitors for the plaintiff: *Monroe & Anderson.*

Solicitors for the defendants Peel and Brayden: *J. & E. Peel & Son.*

Solicitor for the defendant M'Clelland: *Robert Henderson.*

R. D. M.

(1) On a second trial, before the Lord Chief Justice and a special jury, a verdict was given for the plaintiff for one farthing in the original action, and for the defendant Peel for one farthing on the counterclaim.—[ED.]

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1899.

Feb. 24, 25, 27.
May 16.

ADAMS, Tenant; DUNSEATH, Landlord (No. 2) (1).

Landlord and tenant — Land Acts, 1881–1896 — *Improvements — Increased letting value—Allowance to tenant in respect of improvement work—Balance of increased letting value.*

In fixing the fair rent of a holding, the Land Commission adopted the principle that after making a fair and liberal allowance in respect of the tenant's improvement works, the surplus or balance of increased letting value was the property of the landlord and not of the tenant, and that the landlord was entitled to have a fair rent fixed in respect of that portion of his property. Upon a special case asking the question whether the principle, so adopted by the Land Commission, was right in law:—*Held,* by the Court of Appeal (*diss.* Lord Ashbourne, C., Porter, M.R., and Holmes, L.J.), that the question should be answered in the negative, the majority of the Court concurring in formulating the following propositions:—

1. That in fixing the fair rent of the holding the tenant was entitled, in respect of the present capital value of his improvement works, to such return by way of annual allowance as the Land Commission should determine to be fair, and sufficient to satisfy the provisions of the Land Law (Ireland) Act, 1881, section 8, sub-section 9.

2. That if the allowance so made was measured by way of percentage, merely upon the present capital value of the tenant's improvement works, or of his expenditure in moneys numbered, labour, and skill, and if, after the allowance so made, any surplus or balance of increased letting value due to his improvements remained, the Land Commission was bound to have regard in dealing with such surplus or balance to the matters hereinafter mentioned.

3. That in fixing the fair rent of the holding, and in dealing with the surplus or balance aforesaid, the Land Commission was bound to have regard to the interest of the landlord and tenant respectively, and to consider all the circumstances of the case, holding, and district, including the amount of such

(1) Before Lord Ashbourne, C., Sir P. O'Brien, L.C.J., Porter, M.R., Palles, C.B., FitzGibbon, Walker, and Holmes, L.JJ.

This Appeal was as a fact entitled *Martha Smyth, Committee of the fortune and estate of Margaret Dunseath, a lunatic, Landlord; David Adams, Tenant;* but, for uniformity, the name under which the case is reported in the Court below is retained.

surplus or balance, and the sources from which the same was derived; treating the latent or dormant resources of the soil, as let by the landlord to the tenant, as the property of the landlord, and treating the development of those resources by the improvement, as the act of the tenant.

4. That it was within the exclusive jurisdiction of the Land Commission, having due regard to the foregoing principles, to consider and determine whether, and in what proportions, the said surplus or balance should be divided between the landlord and the tenant in fixing the fair rent of the holding.

Per Lord Ashbourne, C., Porter, M.R., and Holmes, L.J., that the principle adopted by the Land Commission was correct, and that the question submitted should be answered in the affirmative.

APPEAL by way of case stated from the decision of the Irish Land Commission already reported (1).

The case was stated in the following terms:—

"On the 10th day of October, 1896, the tenant in this case served the landlord with an originating notice of an application to the Court of the Land Commission to fix a fair rent for his holding, payable during a second statutory term. We refer to this notice which bears date the 16th day of September, 1896.

"It describes the lands as the lands of Kildowney, in the county of Antrim, and Poor Law Union of Ballymena. The other particulars as to the holding stated in the originating notice are as follows:—

"1.	Area in statute measure, .	42A. 1R. 5P.
	Rent of holding, . .	£32 15*s.* 0*d.*
	Gross Poor Law valuation, .	£24 15*s.* 0*d.*

"2. The application came on to be heard before a Sub-Commission sitting at Ballymena, duly delegated and authorised to decide the case. The Sub-Commission made an order bearing date the 7th day of April, 1897, to which we refer, fixing the judicial rent of the holding for the second statutory term of 15 years (commencing from the 1st December, 1896), at £17.

"3. In the schedule to their order, prepared and recorded by the Sub-Commission, under the provisions of section 1 of the Land Law (Ireland) Act, 1896 (to which schedule we refer), the Sub-Commission (among other things) set forth that 16 acres of the

(1) [1898] 2 I. R. 709.

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holding had been reclaimed by the tenant at a cost of £6 per acre, that the present capital value of the aforesaid tenant's improvement was £144, the increased letting value due thereto £7 4*s*., and the deduction from the rent on account of such improvements £6.

"4. By notice bearing date the 26th day of May, 1897, to which we refer, the landlord stated that he was aggrieved by the said order, and required the case to be reheard before three Land Commissioners sitting together.

"5. Accordingly the case was reheard before Mr. Justice Bewley, Mr. Commissioner Wrench, and Mr. Commissioner Fitz Gerald, Q.C., in Belfast, on the 3rd day of December, 1897.

"6. Mr. Justice Bewley having resigned the office of Judicial Commissioner before the judgment of the Court on such rehearing had been pronounced, and Mr. Justice Meredith having been appointed Judicial Commissioner, the case was, by consent of the parties, re-argued before Mr. Justice Meredith, Mr. Commissioner Wrench, and Mr. Commissioner Fitz Gerald, Q.C.

"7. On the hearing it was admitted that the holding is subject to the Ulster Tenant-right Custom.

"8. The question of law argued before us, and with which this case is conversant, arose in relation to the reclamation of certain portions of the holding, and the respective rights of the landlord and tenant in the increased letting value arising from such reclamation.

"9. Mr. Serjeant Dodd and Mr. Greer, on behalf of the tenant, argued that the tenant was entitled to a deduction or allowance equivalent to the entire estimated amount of the increased letting value inasmuch as (Counsel contended) such estimated amount would represent no more than a fair return to the tenant in the present case for the work he had executed. Moreover, the Ulster Custom applied, and on an estate where the custom prevails the landlord (Counsel contended), at any rate in early times, never sought to exact anything from the tenant in respect of the labour or capital expended by him. For these reasons (Counsel contended) no question in the present case could arise with reference to any surplus or balance of increased letting value. But even assuming that a fair and proper return by way of annual allowance

to the tenant should be measured at a sum less than the entire increased letting value, the tenant (Counsel contended) had, under the authority of the former case of *Adams* v. *Dunseath* (1), irrespective of, and apart from, the Ulster Custom, an interest over and above the allowance so made to him in respect of the improvements he had effected, which, it was argued, would be more than sufficient to absorb any balance of increased letting value that might remain.

"Mr. Matheson and Mr. Caruth, on behalf of the landlord, contended that the former case of *Adams* v. *Dunseath* (1) established that the only allowance or deduction in respect of improvements to which a tenant was entitled when fixing a fair rent for the holding was an allowance or deduction equivalent to a fair rate of interest upon the original cost of his improvement works, so far as the original value existed at the time of fixing a fair rent. *Adams* v. *Dunseath* (1) (Counsel contended) decided that the term "improvements" in section 8, sub-sect. 9 of the Act of 1881 must receive the definition given to the term in the Act of 1870, and that the only improvements in respect of which the tenant could claim exemption from rent, or an allowance or deduction in fixing a fair rent, were the same improvements for which he would be entitled to claim compensation on quitting his holding; accordingly that such exemption allowance or deduction should not exceed a fair percentage on the original cost of the improvement works.

"Any division of the surplus or balance of increased letting value between the landlord and tenant, or any further allowance to the tenant in respect of his improvements, or any other deduction from, or diminution of, what would otherwise be the fair rent of the holding would (it was contended) be contrary to the Land Acts.

"The existence of the Ulster Custom (it was contended) did not affect the principles applicable to the fixing of a fair rent.

"10. We were of opinion (and stated in our judgment delivered on the 26th day of July, 1898), that the rights of the landlord and tenant, under the Land Law (Ireland) Acts, and the

(1) 10 L. R. I. 109.

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principles upon which this Court should act in relation to the increased letting value arising from reclamation were as follows:—

"(*a*) That the tenant was entitled to a fair, and even a liberal, return by way of annual allowance in respect of the present capital value of his improvement works.

"(*b*) That in ascertaining that capital value and measuring that allowance regard must be had not merely to the expenditure of the tenant in moneys numbered, or labour, but to the skill of the tenant employed in the development of the latent or dormant resources of the soil.

"(*c*) That any surplus or balance of increased letting value remaining after the allowance so made could not be divided between landlord and tenant, but was the property of the landlord, and that the landlord was entitled to have a fair rent fixed in respect of that portion of his property in the same manner, and upon the same principles, in which and upon which the fair rent was fixed by the Court in respect of those portions of the holding as to which no question of improvement arose.

"We were further of opinion (and so stated) that the fact that the holding was subject to the Ulster Tenant-right Custom did not alter the rights of the parties.

"11. Acting on the principles as laid down by us we considered and decided in the present case:—

"(*a*) That the tenant or his predecessors in title had reclaimed from waste land portion of the holding amounting in all to 16 statute acres.

"(*b*) That the present capital value of the improvements made by the tenant or his predecessors in title in effecting such reclamation was £96.

"(*c*) That the letting value of the 16 acres was increased by the reclamation to the extent of £6 15*s*. per annum.

"(*d*) That the sum of £4 15*s*. per annum, being at the rate of £5 per cent. per annum upon £96, represented and was a fair and liberal return to be made to the tenant by way of annual allowance during the second statutory term in respect of the present capital value of the improvements effected by him as aforesaid.

"(*e*) That the landlord was entitled to the surplus of balance of increased letting value (amounting to £1 19*s*.), being the

difference between the above-mentioned sums of £4 16*s.* and £6 15*s.* as part of the fair rent of the holding.

"12. We were accordingly of opinion that the sum of £4 16*s.* should be deducted from the annual sum, which in pursuance of section 1 sub-sect. 1 (*a*) of the Land Law (Ireland) Act, 1896, we were of opinion should be ascertained and recorded in the schedule to our order, as the annual sum which should be the fair rent of the holding, on the assumption that all improvements thereon were made or acquired by the landlord, and that the fair rent of the holding should be fixed at the sum of £19 2*s.*

"On the application of Counsel for the tenant we agreed to state the present case for the consideration and determination of Her Majesty's Court of Appeal in Ireland.

"The question submitted for such consideration and determination is:—

"Whether, upon the facts stated in the case, the principles laid down by the Land Commission in reference to the increased letting value arising from the reclamation of the 16 acres, and the mode of dealing with same in fixing a fair rent of the holding were correct in point of law."

Serjeant Dodd and *T. M. Healy* (with them *E. Greer*), for the tenant (appellant).

Campbell, Q.C., and *Matheson, Q.C.* (with them *Caruth*), for the landlord (respondent).

Cur. adv. vult.

May 16.

LORD ASHBOURNE, C.:—

This case comes before us on a question submitted for our consideration by the Land Commission.

The facts are few and simple. The area of the holding was 42A. 1R. 5P. statute measure; the rent was £32 15*s.*, and the gross Poor Law valuation was £24 15*s.* The case came before a Sub-Commission to fix a fair rent for the second statutory term, and they fixed the fair rent at £17. In the schedule to their order the Sub-Commission (amongst other things) set forth that 16A. of the holding had been reclaimed by the tenant at a cost of £6 an acre; that the present capital value of the aforesaid tenant's

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improvement was £144; that the increased letting value due thereto was £7 14*s.*, and the deduction from the rent on account of such improvement was £6, which represented 5 per cent. upon the estimated cost of reclamation. The balance or surplus of the increased letting value after the deduction the Sub-Commission divided equally between the landlord and the tenant.

The parties being dissatisfied brought the case by way of appeal before the Land Commission, and the questions mainly discussed were whether the Sub-Commission were right in principle in so dividing the balance or surplus of increased letting value equally between the landlord and tenant; if not, how that balance or surplus should be dealt with, and how far, if at all, the Ulster Custom affected the result.

I think it right to say at once that I do not think any evidence appears in the case, as presented to us, which would indicate that the Ulster Custom would vary the result, assuming the decision to be otherwise right.

It will also tend to simplify the case if I further state that this Court has nothing to say to the amount allowed for improvements or the rate per cent. upon the estimated cost of reclamation. That is a matter wholly for the Land Commission, and we must assume that they exercised their discretion on the subject with due consideration. This leaves clear the important question of principle which came before the Land Commission.

Mr. Justice Meredith, in giving judgment, said:—

> "The Court found as a fact that portion of the land comprised in the several holdings had been reclaimed by the tenants or their predecessors in title, and that the letting value of the portion so reclaimed had been thereby increased. The method employed by the Sub-Commissioners appears to have have been as follows:—After deducting from the increased letting value a sum equivalent to 5 per cent. on the estimated cost, they have divided the surplus or balance of increased letting value equally between the landlord and tenant. The Sub-Commissioners have not stated in express terms that the deduction from the rent has been arrived at in this way; but I think it is obvious from a consideration of the figures that this has been the course adopted. In my opinion the Sub-Commissioners were wrong in principle. The conclusion I have arrived at as to the rights of the landlord and tenant in cases like the present is as follows:—The tenant is entitled to a fair and even a liberal return, by way of annual allowance, in respect of the

present capital value of his improvement work. In ascertaining that capital value and measuring that allowance regard must be had not merely to the expenditure of the tenant in moneys numbered, or labour (which is money's worth), but the skill of the tenant employed in the development of the latent or dormant resources of the soil. If the amount of the increased letting value does not exceed the amount of the annual allowance to the tenant, measured in the way I have indicated, the tenant absorbs and is entitled to the entire of the increased letting value. Of course the allowance to the tenant never can exceed the entire amount of the increased letting value; but if, after a fair and liberal allowance has been made in respect of the tenant's improvement works, any surplus or balance of increased letting value remains, that surplus or balance, in my opinion, is the property of the landlord, and he is entitled to have a fair rent fixed in respect of that portion of his property in precisely the same manner, and upon the identical principles, in which and upon which a fair rent is fixed by this Court, in respect of those portions of his arable or pasture lands, as to which no question of improvement arises. I can find no reason and no justification for the allocation of this portion of the landlord's property between him and the tenant."

The case of *Adams* v. *Dunseath* (1) clearly laid it down that "improvement" meant "improvement works," and did not mean "increased letting value." I can find nothing in that decision inconsistent with the judgment of Mr. Justice Meredith. In *Adams* v. *Dunseath* (1) it was clearly recognized that after the tenant had been fully and thoroughly protected in "the enjoyment of a just and even of an ample return in respect of the present value of the additional capital, which his improvements have added to the holding," there may remain some surplus or balance of the increased letting value. Several members of the Court of Appeal in my opinion also decided that that surplus or balance must be dealt with under sub-section 1 of section 8 of the Act of 1881, that is, that a fair rent should be fixed in respect of it, "having regard to the interest of the landlord and tenant respectively, and considering all the circumstances of the case, holding, and district." Lord Justice FitzGibbon in his judgment pointed out:—

"Thus far, however, our unanimous statement of the rule appears to me to lead—that the landlord is entitled, as part of the fair rent of the holding, to so much of any increase of letting value consequent upon

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improvements, after making a fair return to the tenant upon the value of the improving works, as is derived from the utilization of the landlord's interest in the inherent qualities, advantages, and resources of the holding."

Lord Chancellor Law had previously given his view:—

"In my opinion, therefore, the negative provision contained in subsection 9 of the fair rent clause (section 8) of the Act of 1881, that no rent shall be allowed or made payable in respect of tenant's improvements secures against the imposition of any rent only the improvement works; that is, their yearly value, leaving any increased yearly value beyond that to be dealt with under the earlier part of section 8 as may under the circumstances of the case be considered just and fair between the parties."

Sir E. Sullivan, M.R., also said that after allowing the tenant a fair percentage or yearly allowance for his expenditure, the remainder of the increased letting value "should be dealt with by the Commissioners under the early part of the 8th section of the Act of 1881 with due regard to the interest of the landlord and tenant respectively." Although there are some reservations of opinion, I can find in the decision no warrant for dividing the surplus or balance between landlord and tenant, which would practically exempt the tenant from all rent in respect of the moiety allotted to him.

I am in fine unable to find in the decision of *Adams* v. *Dunseath* (1) any real support for the argument of the appellant in the present case.

The Land Law (Ireland) Act, 1896, states with precision the duty of the Land Commission in assessing the fair rent of a holding. Sub-section 9 of section 1 is as follows:—"In assessing the fair rent of any holding no deduction shall be made, except such deductions as shall be specified and accounted for in the said schedule, and are in accordance with the provisions of the Land Law Acts." The schedule was set out in an appendix of the Act; and a new form has been prescribed by the Land Commission. This schedule is commonly called "the Pink Schedule," and its terms are of high importance, as therein must be specified and accounted for all deductions from the gross fair rent.

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The portion of the Pink Schedule appropriate to the present controversy is:—"(7) State the improvements in the holding made wholly or partly by the tenant or at his cost." Then follow columns headed—"nature and character of each such improvement"—"present capital value"—"increased letting value due thereto"—"date when made as near as can be ascertained"—"extent (if any) to which the landlord has paid or compensated the tenant in respect of each such improvement"—"deduction from the rent on account of each such improvement."

The duty of the Land Commission is thus found to be to ascertain the gross fair rent on the prescribed presumption, and to measure the amount of the deduction on account of each improvement. What is not deducted will, in the language of Lord Chancellor Law, be dealt with under sub-section 1 of section 8 of the Act of 1881, "having regard to the interest of the landlord and tenant respectively, and the circumstances of the case, holding, and district."

We have nothing to say, as I have already mentioned, to the amount of deduction or the rate of allowance; but being of opinion that the Land Commission have measured the amount which should, in their opinion, be allowed on account of the improvements made by the tenant, I can see nothing to indicate that they have proceeded on any erroneous principle.

In my opinion the question submitted by the Land Commission should be answered in the affirmative.

SIR P. O'BRIEN, L.C.J.:—

A judgment embodying the concurrent opinions of the Lord Chief Baron, Lord Justice Fitz Gibbon, Lord Justice Walker, and myself, has been prepared by us in conference, and the Lord Chief Baron has kindly undertaken to read this judgment after the Master of the Rolls has delivered his judgment.

We have also formulated in conference the answer that should be given to the question proposed in the special case. As we think it desirable not to multiply judgments, but that there should be but one judgment to which the Land Commission may hereafter refer for guidance, we will not individually add anything to the written judgment.

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PORTER, M.R. :—

By the common law any improvement of the sort now in question was and is the property of the owner of the land. It forms part of it just as a tree, or a quarry, or a natural water-course. Apart from any local custom controlling or modifying the common law, a tenant of an agricultural holding had no property or interest in houses, drains, reclamations, or the like, even when made altogether by himself, except as part of the holding; and if he was tenant at will or from year to year the determination of his tenancy deprived him of all that formed part of it. I am not speaking at present of any tenant-right question. The Act of 1870, called by Mr. Donnell the Magna Charta of the tenant farmers, altered this; not by giving to the tenant any property in improvements made by himself, but by conferring on him an interest in them in the nature of a right to compensation on quitting his holding. That is, if the improvement was, say, a house, the tenant could not pull down the house and remove the materials, but he could recover from his landlord compensation in respect of it within certain limits. This (though owing to the limit as to amount and otherwise not wholly adequate), was a great boon to improving tenants. The improvements, however, whether the tenant quitted the holding by his own act or through that of the landlord, formed as before an integral portion of the holding, and did not save the tenant from eviction or from liability to pay rent in respect of the holding in its improved state.

Section 70 defines improvements as used in the Act, and of course in section 4, as :—

Any work which being executed adds to the letting value of the holding on which it is executed, and is suitable to such holding; also—

Tillages, manure, or other like farming works, the benefit of which is unexhausted at the time of the tenant quitting his holding.

There is no other definition of "improvements," so far as I am aware, in any of the Land Acts.

We come then to the Act of 1881. By section 8, sub-section 9 it is enacted :—"No rent shall be allowed or made payable in any proceedings under this Act in respect of improvements made by

the tenant or his predecessors in title, and for which, in the opinion of the Court, the tenant or his predecessors in title shall not have been paid or otherwise compensated by the landlord or his predecessors in title."

Thus, whilst under the Act of 1870 the tenant was only secured a limited compensation for improvements on quitting his holding, under the Act of 1881 he is totally exempted from being charged any rent in respect of them whilst he holds the land at a "fair rent" under statutory conditions—and that of course is practically in perpetuity. If he is unable to obtain a fair rent, or from any reason quits his holding, he is still entitled to rely on the 4th section of the Act of 1870; but of course since the passing of the Act of 1881 it will seldom be resorted to.

There is no definition of "improvements" in the Act of 1881. But expressions not defined by it must have the same meaning as the same expressions in the Act of 1870—both statutes being in *pari materia*—as was decided in *Adams* v. *Dunseath* (1). Indeed the Purchase of Land Act, 1885, contains provision to that effect—section 26, and it refers to and supplements the Act of 1881. This proposition cannot be questioned—certainly was not questioned before us.

If then no different meaning is to be put upon the word "improvements" in the later Act from that which it bore in the Act of 1870, the section means no more than that in ascertaining the fair rent of a holding, whilst the entire holding as it stands is to be valued, no rent is to be made payable in respect of any improvement (of the defined sort) that is, of any such improvement work made by the tenant or his predecessors. This insures to the tenant that so long as his tenancy lasts and so long as the improvement works remain, be they farm buildings, fences, or what they may, he is saved from having to pay rent on what he has already paid for. He has no longer to lose his expenditure altogether, as was the case at the common law. He has no longer to wait till the termination of his tenancy to be recouped for his outlay, lying out of it, or worse, in the meantime, as under the Act of 1870. Having spent his money on improvements, he acquires under the Act of 1881 the

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right to remain on in perpetuity if he choose, and, under this section, immunity from rent upon or in respect of all improvement works effected by him. This was an enormous boon to the tenant. In my opinion the Act gives him this, and nothing more. It says not a syllable about improvability or inherent capabilities of the soil, unearned increment, or anything of the sort. It deals with improvements in the sense of works and nothing else. What the tenant contends for here is that besides such deduction from the rent as represented the works themselves, he is entitled further to exemption from rent upon the increased letting value of the holding brought about by his works of improvement. I see nothing in the Act to justify this contention. The law on this subject remains as it always was, except so far as it is altered by the Land Acts. In my opinion it is clear that there is nothing in the Act of 1881 to give to the tenant any interest in the holding itself or any works or improvements upon it further than the Act expresses; and in this respect I think the Act, while it indemnifies the tenant, does not give him any right such as is claimed. Under the Act it is I think the duty of the Land Commission, when fixing a fair rent, to value the holding; to value the tenant's improvements in the sense of the improvement works made by the tenant; and from the rent to deduct such annual sum as will fairly represent the tenant's interest in the improvements. Whether this is called a percentage or not I care not, if it be a fixed and reasonable annual sum as ascertained in relation to the capital value of the works.

Sullivan, M.R., says (p. 137) in *Adams* v. *Dunseath* (1) :—

> "'Improvements' does not and cannot mean the increased letting value of the holding caused by the making of the improvements: but simply the works which have caused that increase, or rather the interest of the tenant who made them, measured by the money expended on them, as declared and limited by the said two Acts."

In that case five questions were submitted for the judgment of the Court of Appeal. The Court in lieu of them substituted six others which they considered more properly fitted to raise the real questions in the case. Neither in any of the five, nor in any of

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the substituted six, was the present question directly raised. The first of the latter (1, what is the meaning of the word "improvements," &c.) elicited the unanimous opinion of the Judges, that in the Act of 1881 it means the same thing as in the Act of 1870. Law, C., says (pp. 119, 120):—

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"In my opinion, therefore, the negative provision contained in sub-section 9 of the fair rent clause (section 8) of the Act of 1881, that 'No rent thall be allowed or made payable in respect of tenants' improvements,' secures against the imposition of any rent only the improvement works, that is, their yearly value, leaving any increased yearly value beyond that to be dealt with under the earlier part of section 8, as may under all the circumstances of the case be considered just and fair between the parties. For it should be observed that though the absolute prohibition of charging rent contained in this 9th sub-section is thus limited, it by no means follows that rent is to be charged on all outside the scope of the prohibition. That is a matter for the Commissioners in the exercise of their discretion, and having regard to what may appear to them to be just and right."

May, C.J., says (p. 131) to the same effect that:—

"The term being impressed with this definite meaning, it seems to me that the operation of this 9th sub-section will be confined within somewhat narrow limits. The sub-section enacts that no rent shall be allowed or payable in respect of any improvement created by the tenant or his predecessors in title. In the case of the erection of a house, or any structure having an existence separate from the lands, this language is of easy application, and seems simply to mean that the holding shall be valued irrespective of such structure.

"But in the case of drains and other works of reclamation or improvements of that nature, it would seem that the language of the sub-section is not appropriate. It seems that rent could hardly be claimed in respect of a drain, or in respect of an embankment made for the purpose of reclamation, or any similar work. The improvement work in such cases possesses in itself little or no annual value, and the increased value which it may confer on the adjoining land is not an improvement in its statutory sense; nor does it appear to me that the expenditure of money or labour in the construction of such a work can be regarded as an "improvement"; such expenditure or labour could not be registered under the 6th section of the Act of 1870. It appears to me that improvements of this class do not fall within the operation of this 9th sub-section; but this result would not be prejudicial to the tenant. Such expenditure would, I think, constitute one of the circumstances of the case to be considered by the Commissioners in fixing a

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fair rent. But in what manner such a circumstance should be had regard to, or by what process the rights or interests of the landlord and tenant respectively in the holding should be ascertained, is not, I think, a matter of law on which this Court is called upon to express any opinion—rather a matter of valuation to be entertained by an intelligent tribunal."

Sullivan, M.R. (pp. 137, 138), says:—

"We are not left to speculate on this matter; for the very word is the subject of express definition in the Act of 1870, the 70th section thereof defining improvements as follows:—'Any work which being executed adds to the letting value of the holding on which it is executed, and is suitable to such holding'; and the 57th section of the Act of 1881 directs that Act and the Act of 1870 to be construed together as one Act; which in itself would, I think, be sufficient to show the true meaning of the word improvements in the 9th sub-section of the 8th section of the Act of 1881, . . . any words or expressions therein which are not thereby defined, and are defined in the Act of 1870, shall, unless there be something in the context repugnant thereto, have the same meaning as in the Act of 1870, except so far as the same is expressly altered or varied, or is inconsistent therewith. The conclusion on this very important matter which seems to have been adopted by two of the learned Commissioners, Mr. Justice O'Hagan, and Mr. Commissioner Litton, is, in my mind, erroneous. An interpretation of the 9th sub-section in question, which would make the term improvements therein mean the whole increase of letting value, involves consequences so large and startling that one testing the construction of the statutes is at once disposed to think some error must exist; for as a tenant on quitting his holding would only be entitled at the utmost to the value of the expenditure on the work that caused the increase of letting value, he, remaining in his holding and claiming to have a fair rent determined, would on such an interpretation be entitled to have awarded to him as his own property, as against the landlord, the whole increase of letting value caused by his expenditure. For instance, a tenant paying a rent of £100 a-year for his holding during his tenancy may spend £500 in executing works in the nature of permanent improvements, causing an increase of the letting value of his holding of £100 a-year at the time he quits. The utmost he could get on quitting his holding, under the Act of 1870, even as amended by the Act of 1881, would be £500, and that sum may be capable of being reduced to a lower point; while, though not quitting, and a still abiding tenant, with all the advantages of the judicial term and rent, the Commissioners would have to allow to him the whole £100 a-year which has been produced by the joint aid of his money, and the soil he has had in tenancy from his landlord. This,

I think, cannot be. The two Acts seem to me entirely opposed to such a conclusion. I can find nothing in the statute of 1881 to show that such a change in the position of the tenant and landlord was ever contemplated; on the contrary, the sub-section itself stands strongly opposed to such a construction. By its very language, the test as to whether no rent is to be allowed in respect of improvements, is whether they have or have not been paid for or otherwise compensated by the landlord. What is the landlord to pay for or otherwise compensate? Surely not the whole increased yearly letting value added by the making of the improvements, but at the utmost the amount of money expended by the tenant in making the same."

Morris, C. J. (p. 146), says:—

"First, with respect to the word 'improvements.' It appears to have been used and dealt with as of the same signification as 'the increased letting value,' caused by the improvements.

"The word is defined in the Act of 1870 as 'any work which, being executed, adds to the letting value of the holding, &c.,' but the addition to the letting value is caused by the work, plus the inherent qualities and capacity for such work of the holding—the latter is the landlord's, while the former is the tenant's."

Palles, C. B., treats the definition of improvements as a matter of course (see p. 154).

Deasy, L. J. (p. 174), says:—

"By this section the tenant gets the right to enjoy them for the statutable period without being charged any rent for them. That may be politic, wise and just, and I do not question its policy, its wisdom, or its justice. But I think that such a great change in the law, involving such serious consequences, ought not to be extended by construction beyond the legal signification of the words used by the Legislature in effecting it. It ought not to be extended to cases not included in its terms, merely by inferences from another clause dealing with another subject-matter, and which is not referred to in it directly or indirectly."

Fitz Gibbon, L. J. (p. 180), says:—

"Thus far, however, our unanimous statement of the rule appears to me to lead—the landlord is entitled, as part of the fair rent of the holding, to so much of any increase of letting value consequent upon improvements, after making a fair return to the tenant upon the value of the improving works, as is derived from the utilisation of the landlord's interest in the inherent qualities, advantages and resources of the holding."

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These statements, though perhaps only *dicta*, and not directly arising in the case of *Adams* v. *Dunseath* (1) are of course entitled to great weight; but from them all I gather that if the question of increased letting value arose it could not be dealt with by this Court under sect. 8, sub-sect. 9 at all, but could only be considered if at all under the clauses, particularly sect. 8, sub-sect. 1, dealing with the fair rent of the holding. Under that clause, I do not question that it would be open to the Land Commission to consider it as one of the "circumstances of the holding," when having regard to the interests of the landlord and tenant respectively; in other words, that the Land Commission may, in fixing a fair rent of the holding, with all the improvement works upon it, discriminate between the case of an improving tenant and that of one who has not improved or even has deteriorated his holding, or between one tenant who has shown skill in planning and carrying out the improvements and another who has not. But they must be like every other element of fair rent, the subject of skilled and experienced examination, consideration, and appraisement. The increased letting value is the landlord's. It is a part of the holding which is his. But the holding in its entirety is subject to the jurisdiction of the Land Commission in fixing a fair rent.

If this be correct, has the law been changed by the Act of 1896? I think it very clear that it has not. The words relied on as showing that it has are in sect. 1, sub-sect. (1) (*c*) (i), "and the increased letting value due thereto." Now this first sub-sect. contains directions as to the particulars to be placed in the schedule prescribed by the Act. These particulars are numerous and detailed. "The improvements made" must be and are the same as those in the previous Act, save so far as they are expressly altered. The scope of the word "improvements" *is* altered by sub-section (3):—"No rent shall be allowed or made payable in respect of an improvement made by the tenant on a holding by reason only of the work constituting such improvement not being suitable to the holding." If, then, the Legislature had meant to alter the law, and to extend the definition so as to include not alone improvement works, but

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also increased letting value consequent thereon, we should have found it so stated. "No rent shall be allowed in respect of such increased letting value," just as "no rent shall be allowed in respect of an improvement work made by the tenant by reason only of the work constituting the improvement not being suitable to the holding." The section down to the end of sub-section (1) was apparently designed to require precision, so that the Land Commission shall have to go into much detail for the satisfaction of the parties. The annual value representing a fair rent, on the assumption that all the improvements had been made or acquired by the landlord, is first to be ascertained, or at least is to be first written down on the schedule; though that will not be the fair rent, and affords no argument in favour of the landlord founded upon that assumption. The nature, character, and present capital value of the improvements made wholly or partly by the tenant is to be ascertained. Having ascertained the capital value, the Commission is also to ascertain the increased letting value due thereto: a very natural, and in any view a very useful requirement; for if the capital value of an improvement, for instance a house, was, say, £250, and the increased letting value derived from it is, say, only £7 per annum, it would or might be desirable to have that fact ascertained, either in reference to the improvement, or to the question of fair rent of the holding. No one ever heard of great and important rights being conferred by statute under a section defining what particulars were to be put in a schedule.

I do not think this Act alters the law in this particular.

In the present case the Land Commission has allowed the tenant what is described as a fair and liberal return in respect of the capital value of the improvements. We cannot go behind that statement or differ from it unless we decide that its assessment was wrong in principle. The only way we could do that would be by deciding as matter of law that the tenant was entitled in respect of improvements—that is improvement works—to claim for increased letting value: that is, first for the improvements, and over and above that for increased letting value. The latter, in my opinion, is outside the enactments with which we are immediately concerned, and can only be taken into account in the way I have

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already said, that is in fixing a fair rent of the holding as one entire thing which belongs to the landlord, subject to the tenancy with all its incidents.

I must add a word about the question of the Ulster Custom, to which it is found the holding is subject. If the Land Commission meant to decide that as matter of law the Ulster Custom could not apply to such a case, I should have required more argument than I have heard to convince me that that was so. It may be that such a custom might exist, and it might conceivably be lawful; though in the course of my experience of such cases I never heard of the question of increased letting value being imported or alleged to be imported into the question of tenants' improvements. Under the custom, the tenants were only too happy if they were not called on to pay rent for the works of improvement themselves, without going into any question of enhanced letting value beyond that. I only say this to guard myself in the matter; because I do not read the case as stating or suggesting that any custom applied to the particular holding other than that which prevailed generally throughout the province; and under the custom in its widest form, it could not be successfully contended that it would govern the present case; at any rate the case does not find anything about the incidents of the custom applicable to the case, or that it could in any way affect the question.

I am of opinion that the grounds upon which the Land Commission proceeded were correct, and that the question with which the case concluded should be answered in the affirmative.

PALLES, C.B.:—

This is the judgment of the Lord Chief Justice, Lord Justice Fitz Gibbon, Lord Justice Walker, and myself.

The question submitted to us is "Whether, upon the facts stated in the case, the principles laid down by the Land Commission in reference to the increased letting value arising from the reclamation of the 16 acres, and *the mode of dealing with same in fixing a fair rent of the holding*, were correct in point of law?"

So far as this question relates to "the principles" involved, the matter is one of law, and therefore has been properly reserved for

us: but if, by the introduction into the question of "the mode of dealing with same," we are invited to consider the propriety of the manner by which, in moneys numbered, those principles have been applied in this particular case—indeed unless we are to exclude these latter words as surplusage—the question involves matter of fact which we are not permitted to consider. We call attention to this, because it is specifically stated in the case that the return to be allowed to the tenant, by way of annual allowance in respect of the present capital value of his improvement, was calculated at the rate of 5 per cent. per annum on the capital sum of £96; and we need not say that all considerations in relation to amount of the capital value or the rate of the allowance is outside our jurisdiction. We have no doubt that the Land Commission did not intend to include in their question the consideration of value or rate; and we mention the matter merely *ex abundanti cautela*, to prevent any possibility of future misinterpretation of our view.

We come, then, to the consideration of the principles applicable to a holding which is not subject to the Ulster Tenant-right Custom, reserving till later on the consideration of the separate question, whether the principles are the same in reference to a holding which is subject to that custom.

The principles upon which the Commission proceeded are thus stated:—

"(*a*). That the tenant was entitled to a fair, and even a liberal return, by way of annual allowance, in respect of the present capital value of his improvement works.

"(*b*). That in ascertaining that capital value, and measuring that allowance, regard must be had not merely to the expenditure of the tenant in moneys numbered or labour, but to the skill of the tenant employed in the development of the latent or dormant resources of the soil.

"(*c*). That any surplus or balance of increased letting value remaining after the allowance so made, could not be divided between landlord and tenant, but was the property of the landlord; and that the landlord was entitled to have a fair rent fixed, in respect of that portion of his property, in the same manner and upon the same principles in which and upon which the fair rent

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was fixed by the Court in respect of those portions of the holding as to which no question of improvement arose."

These latter words we understand to mean "as if the improvements had been made or acquired by the landlord."

There may possibly be some vagueness upon the words of the case as to the elements which were taken into consideration in fixing "the fair return by way of annual allowance which the tenant was entitled to"; but we gather from the judgment of Mr. Justice Meredith, and from the statement of counsel on both sides during the argument here, that that allowance was confined to the tenant's interest under sub-section 9 of section 8 of the Act of 1881 in the improvements, in respect of which interest it was thereby directed that no rent should be allowed or made payable. Taking the proposition in this sense, the word "liberal" in sentence (*a*), although it is taken from more than one of the judgments in *Adams* v. *Dunseath* (1), cannot carry with it any force or effect. It must either be used as merely synonymous with "fair" (which, according to our language, it is not), or by reason of its use it is implied that the amount of the allowance may be increased beyond that which would be arrived at, were "fair" the only word used; and we hold that the tenant is entitled, under sub-section 9 of section 8, to nothing more than a "fair" allowance.

Passing from this, which rather partakes of a verbal criticism, we come to the main question for determination. Are the Commission, in every case, and irrespective of the amount of the increased letting value due to a tenant's improvements, without jurisdiction to allow to such tenant, in respect of those improvements, any greater amount than the sum ascertained according to the principles laid down in sentence (*a*), viz. an allowance in respect of the capital value of that which, by sub-section 9, sect. 8, is exempted from rent? To determine this, we must first ascertain critically the exact matters which were decided in *Adams* v. *Dunseath* (1). Of the questions formulated there by the Court, two only, viz. the first and third, are germane to the present case. (1), What is the meaning of the word "improvements" in the

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9th sub-section of sect. 8 of the Land Law Act, 1881? (3), Are the provisions of the final paragraph of the 4th section of the Land Act of 1870, as to a tenant claiming compensation for improvements made before the passing of that Act, applicable to such improvements, in determining what is a fair rent under the 8th section of the Act of 1881? The answers to those questions were, (1), "that the meaning of the term 'improvements' is the same as in the Landlord and Tenant Act, 1870, s. 70," and (2), "that the 3rd question should be answered in the affirmative." The legal effect of those answers is (1), that the improvements which are to be excluded from the subject-matter upon which the rent is to be ascertained consist of the *interest* of the tenant under the Act of 1870 in "the improvement *works*," and not the increased letting value of the land due to such works; and (2), that the surplus or balance of such increased letting value, over and above such fair annual allowance as ought to be made to the tenant in respect of his improvements under sub-section 9, must be dealt with under sub-section 1 of sect. 8. The decision went no further, and the matters we have stated as having been there decided purport to form the basis of the judgment of the Land Commission on the present case. "The Court of Appeal," says Meredith, J., "decided that it"—*i.e.* the surplus or balance of the increased letting value—"must be dealt with under sub-sect. 1 of sect. 8 of the Act of 1881." Now, how is it to be so dealt with? To use the words of Mr. Justice Meredith, in which we agree, "We must fix a fair rent in respect of it, 'having regard to the interest of the landlord and tenant respectively, and considering all the circumstances of the case, holding, and district.'"

The result, then, is to be arrived at after giving effect to two separate classes of considerations, to two separate factors:—1, the "interest of the landlord and tenant respectively"; 2, "all the circumstances of the case, holding, and district." But Mr. Justice Meredith, having thus laid down this undoubtedly correct principle, as that by which he was to be governed, must now be followed closely in his application of that principle to the facts of the case. He begins by stating that—"It cannot be denied that the language used by some of the Judges of the Court of Appeal appears to indicate that even after a fair and liberal return has

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been made to the tenant in respect of his expenditure and skill in effecting improvement works, he might still be found entitled to a share of the surplus or balance of increased letting value, and consequently to a further allowance or deduction from what would otherwise be the fair rent of the holding." He proceeds then to adopt an explanation suggested by Mr. Matheson to account for the use of those expressions, and he attributes them to the Judges who used them having had in their contemplation the "problem of occupation interest." He then proceeds to point out that the Land Commission had, in a series of cases, decided that no allowance or deduction in respect of occupation interest could be made from what would otherwise be the fair rent of the holding, and that, so far as that Court was concerned, that aspect of the case was closed. He then seems to hold that it necessarily followed, as matter of law, from the tenant not being entitled to an occupation interest, that he was not entitled to any part of the surplus of the increase in the letting value due to his "improvements," over and above the allowance to which he was entitled under sub-section 9 of section 8. It will, however, be observed that this line of reasoning has for its sole basis one only of the two factors which the Legislature has directed shall be taken into consideration, viz. "the interest of the landlord and tenant respectively"; and that only so far as that interest is represented by the amount of the allowance under sub-section 9. It ignores altogether the other factor, which he himself has laid down as one which must be considered; and he thus assumes that the Land Commission were bound, in every case, to exclude from "the circumstances of the case, holding, and district," any consideration of the amount of the increase in the letting value over and above the allowance under sub-section 9.

For such an assumption no warrant can be derived from *Adams* v. *Dunseath* (1). In order to show this, I quote a passage from the judgment of each member of the Court in succession.

Law, C., says:—

> "In my opinion . . . the negative provision contained in sub-section 9 . . . secures against the imposition of any rent *only the improvement works, leaving any increased yearly value beyond that* to be dealt with

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under the earlier part of sect. 8 as may, under all the circumstances of the case, be considered just and fair between the parties . . . Though the absolute prohibition of charging rent contained in sub-section 9 is thus limited, it by no means follows that rent is to be charged on *all outside* the scope of the prohibition. That is a matter for the Commissioners, in the exercise of their discretion, and having regard to what may appear to them to be just and right."

May, C.J., speaking of the expenditure of money or labour by the tenant in the construction of an improvement work, says :—

"Such expenditure would, I think, constitute one of the circumstances of the case to be considered by the Commissioners in fixing a fair rent. But in what manner such a circumstance should be had regard to, or by what process the rights or interests of the landlord and tenant respectively in the holding should be ascertained, is not, I think, a matter of law on which this Court is called upon to express any opinion—rather a matter of valnation to be entertained by an intelligent tribunal."

Sullivan, M.R., says (p. 137) :—

"An interpretation of sub-section 9 which would make the term 'improvements' therein mean the whole increase of letting value involves consequences so large and startling that one testing the construction of the statutes is at once disposed to think some error must exist."

He takes the instance of a tenant paying a rent of £100 a-year for his holding, and spending £500 in executing improvements, causing an increase of the letting value of £100 a-year; and he says (p. 139) :—

"In the illustration I have put, the duty of the Commissioners in determining a fair rent would be, not to allow to the tenant the whole increased letting value of £100 a year, but to assess what would be a fair percentage or yearly allowance for his expenditure, checked and qualified by the consideration of what he would get on leaving his holding; and supposing they thought £400 would be the sum payable, and that a percentage of £10 or £12 per annum was to be allowed upon it, they should leave the £40 or £48 for the tenant free from any rent in respect thereof, while the remaining £60 or £52 should be dealt with by the Commissioners under the early part of the 8th section, with due regard to the interest of the landlord and tenant respectively. These figures are only used to illustrate my meaning. All this would be for the Commissioners, acting under the principles I have indicated, and by which I think they are bound."

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Though his figures are only an "illustration," they demonstrate that Sullivan, M.R., held that making the allowance for the tenant's expenditure, which he assumed to be made in obedience to sub-section 9, did not exhaust, or fully discharge, the duty of the Land Commissioners, but that the question of his right to a further allowance, in respect of the surplus of the increase in the letting value, over and above that allowance, still remained to be dealt with by the Land Commissioners, when fixing the fair rent under the early part of sect. 8.

Morris, C. J., quotes and adopts Mr. Butt (p. 146):—

> "If, for instance, the letting value of the farm was increased by £10 a year, . . . it may be argued that this value is created by the industry or expenditure of the tenant, and that therefore he is entitled to regard the property he has so created as his own. But . . . the additional value is not the creation solely of the tenant. It is the creation partly of the expenditure *and the skill* of the tenant, and partly of the inherent capabilities of the soil."

Morris, C.J., adds these words of his own:—

> "The consideration of the inherent capacity of the soil, in the consideration of the increased letting value caused by improvements or work done by the tenant, . . . might in many cases be the most important factor, while in other cases it might not."

Palles, C.B., says (p. 160):—

> "I am of opinion that the word 'improvements' in the 9th sub-section means works which, being suitable to the holding, add to its letting value, as distinguished from the increased letting value itself . . . The increased letting value caused by the improvements is, no doubt, not the creation solely of the tenant. It is the result, partly of *the expenditure and skill of the tenant*, and partly of *the inherent capabilities of the soil*. Of these two elements, however, the first is supplied solely by the tenant; and the second, the inherent capabilities of the soil, is *portion of that which has been let to him* by the landlord for the term of his lease."

Deasy, L.J., says (p. 175):—

> "With respect to the fixing of a fair rent, and the ascertainment of compensation for improvements to the tenant, I think we cannot, and ought not, to lay down any rule, or enunciate any principle which can or ought to bind the Court in the exercise of the unlimited discretion as to both subjects vested in them by Parliament."

FitzGibbon, L.J., being then the junior member of this Court, came last. Upon the first question he said (p. 177) :—

> "I have to declare my concurrence in the *unanimous judgment of this Court* upon the error which seems to pervade the whole decision of the Land Commission, arising from the confusion of the term 'improvements' with the increase of letting value consequent upon them."

He took the case of two tenants holding at the same rent, expending each the same amount of industry, skill, and money, upon drainage or reclamation. The letting value of the one holding—poor, thankless soil, or disadvantageously circumstanced—is increased by £50 a-year; while in the other case the land, from its inherent qualities or its more favourable circumstances, returns three or four times as much. The capital invested by the tenant in the improvement being in each case the same, the difference of return arising from the utilisation of advantages, or the development of resources, in which the landlord had the largest if not the whole interest, he held that when such advantages and resources were utilised and developed by the tenant, the landlord became entitled to "his fair share" of the return from them. He then said (p. 179) :—

> "In respect of the full present value of the additional capital which his improvements have added to the holding, the tenant should be scrupulously protected in the enjoyment of a just . . . return; but, after this has been provided for, the landlord is equally entitled to the return derived from the more active and profitable use of his interest in the holding. I guard myself, as the Master of the Rolls has done, from saying that the whole surplus profit belongs to the landlord . . . Thus far, however, our unanimous statement of the rule appears to me to lead: the landlord is entitled, as part of the fair rent of the holding, to so much of any increase of letting value consequent upon improvements, *after making a fair return to the tenant upon the value of the improving works*, as is derived from the utilization of the *landlord's interest* in the inherent qualities, advantages, and resources of the holding."

We proceed, then, to do that which sect. 8 directs us to do, to "consider the circumstances of the case and holding." What are those circumstances? That the surplus increased letting value—which is one of the matters in respect of which fair rent is to be fixed—is the product of two elements: first, of the inherent capabilities of the soil, which, subject to the interest therein of the

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tenant as a tenant from year to year, is, and must be held to be, the property of the landlord; and, secondly, of the voluntary act of the tenant in advancing and expending at, his own risk, a sum of money, for which no doubt, in event, he has been compensated, but the advance of which may be considered by the Land Commission to have been, at the time it was made, to a certain extent a speculation. The expenditure might have resulted in a loss, which must have been borne wholly by the tenant. It might, and in event has proved to be a source of a considerable profit; and the question is, is the whole of that profit necessarily the landlord's? Are the Land Commission so strictly fettered that in their ascertainment of that which is fair between landlord and tenant, the principle of the common law embodied in the old maxim, "*Qui sentit onus, sentire debet et commodum,*" must, as matter of law, be excluded? In our opinion they are not. It is impossible to confine the circumstances which are to be considered merely to matters of locality. All such considerations would be open under the words "circumstances of the district" standing alone. When the circumstances to be considered are extended so as to comprise those of "the case and holding," we have no authority to exclude from their purview any circumstance which falls within the words, read in their natural sense; and we hold that such a circumstance as that of the improvement having been made by the tenant plainly falls within both the letter and the spirit of the enactment.

It may be said that, by so doing, we affect the result which would have ensued from the sole consideration of "the interest of the landlord and tenant respectively"; but the words cannot otherwise have any effect or operation whatsoever. If the amount of fair rent must necessarily depend solely upon the respective interests in the holding, then the Act must be read as if it did not contain the words, "considering the circumstances of the case and holding," and it must be admitted that such a construction would be an impossible one. We must give them some effect. We hold that they enable the Land Commission, by their consideration, to modify the strictness of the rule which would have obtained, had their consideration been confined to a strict valuation of the landlord and tenant's interests, irrespective of every other circumstance. It is easy to show by examples how essential to justice was a

provision for such a modifying power. For instance, take the case of a house having been built of so good a character as not to be suitable to the holding: a house, for example, suitable to a farm worth £100 a-year is built on one worth only £40 a-year. In such a case, before the Act of 1896, the tenant would not have been entitled to any allowance under sub-sect. 9. Would it, then, have been imperative upon the Land Commission to have imposed upon him, in addition to the rent of the holding as land, the entire of the increased letting value due to the house which had been built by himself? Were they bound to fix the rent at exactly the same amount as they would have fixed it, had the house been built by the landlord? We are of opinion that each of these questions should be answered in the negative. Again, take the case of two farms, of equal extent, equal value, let at equal rents, under circumstances exactly identical. The tenant of one of these farms cultivates it, not only in a husbandlike manner, but according to the best mode which is consistent with there not being on the holding, when the rent is fixed, such unexhausted tillages or manures as would strictly come within the definition of "improvements." The cultivation of the other, whilst not actually of such a character as to amount to waste, has nearly approached that character. We all know that the letting values of those two farms not only will not be the same, but may differ widely; and is it to be said that the Land Commission are coerced to increase the rent of the first farm above that which they fix on the other, solely in consequence of the mode in which it has been cultivated? We hold that it is not. But how can the special circumstances peculiar to the two cases we have put be taken into consideration by the Land Commission, otherwise than as "circumstances of the case" or "of the holding"? Is the fact that the tenant has built a house, which is unsuitable to the holding, but which increases the letting value, a "circumstance" of that holding and of the case? Is not that house the source from which the increased letting value flows? How can it be said that the fact of its being built, and the fact of the tenant being the person by whom it was built, do not constitute "circumstances" of the holding within the meaning of sub-section 1? We find ourselves unable, upon any principles of sound

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construction, to limit the generality of the words so as to exclude such circumstances; and if they be "circumstances" when the work is not suitable to the holding, so must they also be when it is suitable.

Thus we admit the possibility of the Land Commission allowing to the tenant, in respect of an improvement, more than the value of that which he acquires under sub-section 9. We hold that an additional allowance *may* be, *not* that it *must* be made. We distinguish between the thing which the Land Commission, on the one hand, are imperatively required to allow in every case in which an improvement has caused an increased letting value, as the first charge upon that increase, and that which, on the other hand, they, in their discretion, *may* allow out of the surplus in the particular case in which the increased letting value has amounted to more than the fair allowance under sub-section 9. The allowance under sub-section 9 is matter of law. It does not involve any discretion; it does not depend upon qualifying circumstances as to "case or holding." The additional possible allowance is not a matter of right. As matter of law, we can go no further than to say that the Land Commission, in their discretion, *may* allow it, if, on considering all the circumstances of the case, holding, and district, and having regard to the interest of the landlord and tenant respectively, they think it right and fair to do so. The subject-matter of the first allowance is one which, by the Act of 1881, is excluded from that in respect of which the fair rent is fixed. In other words, under that Act the Land Commission had no jurisdiction to fix a rent in respect of it. The subject-matter of the second is included in that in respect of which the fair rent was to be fixed under that Act; and the allowance, if any, in respect of it, may be arrived at by modifying the strictly legal rights of the parties, upon considerations which, in popular language, are sometimes called fair and equitable, but which, were it not for the section permitting them to be taken into consideration, could not be said to be either legal or strictly equitable, using that word in the sense in which we understand it in our jurisprudence.

For these reasons, although we hold that the inherent capabilities of the soil are the property of the landlord, subject only to the interest therein of the tenant as a tenant from year to year, we

also hold that the Land Commission are not bound, in fixing the fair rent, to give to the landlord the entire of the balance or surplus of the increased letting value due to a tenant's improvement, over and above the allowance in respect thereof made to such tenant under sub-section 9. We think that this surplus or balance ought to be dealt with by the Land Commission, with due regard to all the circumstances of the case and holding, including the circumstance that that surplus has accrued from the act of the tenant; and that in consideration thereof they may deduct from the sum which would have been the fair rent, had the improvement been made by the landlord, such sum as they may think fit, in addition to the allowance which they make under sub-section 9.

We come now to the Act of 1896. That Act does not purport to affect the jurisdiction of the Land Commission, or, in reference to the matter in hand here, make any alteration in the elements to be taken into consideration by it, or in the law which, so far as that matter is involved, regulates the amount of fair rents. It defines, and to some extent it alters, the mode of procedure. It prescribes the ascertainment of certain factors. To use an arithmetical phrase, the Act of 1881 required the result only to be stated; the Act of 1896 requires part of the working of the sum to be also recorded. There is nothing in this Act inconsistent with the view we have stated: as is apparent from the language of sect. 1. That section directs the Court to ascertain, *inter alia*, "the improvements made wholly or partly by the tenant, or at his cost; and with respect to each such improvement—1, the nature, character, and present capital value thereof, and the *increased letting value due thereto*; 2, the date (so near as can be ascertained) at which the same was made; and, 3, the deduction from the rent made on account *thereof*," *i.e.* of the improvements. It is impossible to read a section which directs both the capital value and the amount of the increased letting value due to the improvements to be ascertained, before estimating the deduction to be made in favour of the tenant on account thereof, as confining the factors of that deduction to the capital value.

The remaining question brings in the element that the holding is subject to the Ulster Tenant-right Custom. As to this, the case states, "We were further of opinion, and so stated, that the

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fact that the holding was subject to the Ulster Tenant-right Custom did not alter the rights of the parties." The particular usage to which this holding is subject is not stated; but we understand from the judgment of Mr. Justice Meredith that no evidence was offered that that usage in any way provided for the mode in which the increased letting value caused by the tenant's improvements should be dealt with as between landlord and tenant; and accordingly, if the case is to be read as asking our opinion as to the effect of the Ulster Tenant-right Custom upon this particular holding, we agree in the view of the Land Commission that that custom does not, in this particular case, alter the rights of the parties. To prevent, however, misapprehension, we desire to say that if the case is to be read as laying down the general principle that no usage within the Ulster Tenant-right Custom can affect the apportionment, as between landlord and tenant, of the increased letting value due to the tenant's improvements, we should be unable to hold that such a principle was sustainable in point of law. As, however, we treat the case as not having raised the general question, we do not further refer to it.

HOLMES, L.J. :—

The question of law with which this case is conversant relates to the respective rights of the landlord and tenant in the increased letting value of the holding arising from the reclamation by the tenant of certain portions thereof. The greatest care has been taken in the preparation of the case to indicate the precise matter in controversy upon which the opinion of this Court is required. For this purpose there is first given a condensed report of the arguments of counsel on both sides. This is followed by a statement of the principles which, in the opinion of the Land Commission, are applicable in fixing a fair rent to the increased letting value arising from reclamation. The result is then given of the application of the principles thus formulated to the holding under consideration; and the case concludes with the question whether "the principles laid down and the mode of dealing with the same" are correct in point of law.

All the foregoing matters are set forth in language so clear and definite as to make misapprehension impossible; and, per-

haps, the most convincing testimony to the success with which a difficult task has been performed is, that the opposing litigants are in complete agreement as to the construction of the case and as to the precise point raised by it for decision.

In stating, in my own language, what I conceive this point to be, I am assisted by referring to the first section of the Land Law (Ireland) Act, 1896. It is therein provided that where the Court fixes a fair rent for a holding, the Court shall ascertain and record the annual sum which should be the fair rent on the assumption that all improvements thereon were made or acquired by the landlord. There is no ambiguity in this enactment, and for my present purpose comment on it is unnecessary. It is also provided that the Court shall ascertain and record the improvements made, wholly or partly, by the tenant or at his cost; and with respect to each such improvement—

(i.) the nature, character, and present capital value thereof, and the increased letting value due thereto;

(ii.) the date (so near as can be ascertained) at which the same was made; and

(iii.) the deduction from the rent, made on account thereof.

It appears to me that the question before us arises in reference to (i.) and (iii.).

How is the capital value—how is the deduction referred to in these provisions to be ascertained?

Those are the matters that lie at the root of the controversy, and they are first dealt with by Mr. Justice Meredith in his reported judgment (1) on the assumption that the holding was not subject to the Ulster Custom, or at least irrespective of such custom. He then considers whether the conclusion thus arrived at ought to be altered or modified by the admission of the landlord that the holding is subject to the custom.

I propose to adopt the same order of consideration. Although in the portion of the first section of the Act of 1896, to which I have referred, the words "present capital value" of the improvements is placed in juxtaposition to the "increased letting value due

(1) [1898] 2 I. R. 709.

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thereto," the contrast itself shows that the first-mentioned expression does not mean the increased letting value capitalized. One part of the tenant's argument seemed to place this construction on it: but the effect of adopting it would be to give a wholly erroneous meaning to the term "improvements." If there was one thing determined in *Adams* v. *Dunseath* (1) more clearly than all others, it was, that in the Act of 1881, as well as in the Act of 1870, the word "improvements" must be interpreted as meaning suitable and ameliorative works executed upon the holding. This is certainly not altered by anything in the Act of 1896; and, therefore, what is to be ascertained is the present capital value of a suitable and ameliorative work.

The increased letting value due to it is so far material that unless it exists there can be no improvement. It may also afford important evidence of the skill with which the work was carried out; but there is nothing of which I am aware in the Land Law Code that makes the present capital value of an improvement to depend upon increased letting value in any other way. Therefore the present capital value in this provision can only mean the present value of an improvement work; in other words, the present value of the money, labour, and skill expended in making it.

I now come to the "deduction from the rent made on account of the improvement." This, of course, means the deduction from the annual sum previously ascertained as the fair rent of the holding on the assumption that all improvements thereon were made or acquired by the landlord.

Section 8, sub-section 9 of the Act of 1881 directed that no rent should be allowed or made payable in respect of improvements made by the tenant for which he has not been paid or otherwise compensated; and therefore there must be deducted from the fair rent ascertained upon the aforesaid assumption so much as will give the tenant the benefit of this provision. How then is this to be ascertained? Is it not by giving the tenant a return by way of annual allowance on the present capital value

(1) 10 L. R. Ir. 109.

of his improvements, such present capital value being calculated in the manner already pointed out. The case describes it as a fair or even a liberal return. I think that the adjective "liberal" is not quite appropriate as applied to the adjustment of legal rights. When used by a lawyer to lawyers, it is not likely to mislead; but bearing in mind that the duty of fixing the amount is performed by a tribunal partly composed of laymen, I prefer the word "reasonable." The important point, however, is that it is a return for the present capital value of the money, labour, and skill expended in carrying out the improvement works.

The case, as I understand it, states that in the opinion of the Land Commission the return ought to be strictly limited and confined to this. The tenant's counsel contend that it should go farther, that if the increased letting value due to the improvements exceeds a fair and reasonable return on the present value of the improvement works, the tenant is entitled to either the whole or part of the surplus. Now, if this claim of the tenant is conceded, he is clearly having his rent reduced by reason of something inherent in the character and capabilities of the land. The success of an ameliorative work depends upon two things:

(i.) The money, labour, and skill expended, and

(ii.) The latent capacity of the soil that is stimulated and brought into action by such expenditure.

When the expenditure has been incurred by the tenant, the Land Law Code gives the capital value thereof to him; it is an interest in the holding that is his, and no rent is to be made payable in respect of it. But the Land Law Code has given him no other or greater interest in the capacity of the soil operated on by the expenditure than he had in such capacity when it was latent, or than he would have had if the ameliorative work had been carried out by the landlord. Therefore, unless the tenant can show that he has such an interest in the holding generally, apart from the mere improvement work, as would entitle him to be relieved in some degree from rent in respect thereof, his claim to share in the increased letting value due to the improvements must fail. It would probably for the purposes of the present case be enough for me to say that if such interest exists, it must have been taken into account in arriving at the first figure, the

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annual sum which should be the fair rent of the holding, on the assumption that all improvements thereon had been made or acquired by the landlord; and that having been so taken into account, the tenant ought not to have credit for it again. But if I were to determine the case on this ground, I should be leaving the matter on which the decision of the Court is required still in doubt; and this would not only be unfair to the present litigants, but would also open the way to further difficulties.

The point at which I have arrived is in truth a branch of what Mr. Justice Meredith has called "the problem of occupation interest"—a matter which cannot be passed over, but which will be dealt with more appropriately after I have referred to the authority on which reliance has been placed on both sides.

The philosophical student of humanity, especially if he be somewhat cynical, cannot fail to find much to interest him in the historic case of *Adams* v. *Dunseath* (1). No legal controversy in my time excited so much contemporaneous interest; and certainly no modern lawsuit has attracted so much subsequent attention. It has been discussed without knowledge and criticised without responsibility. A judicial pronouncement on complicated legal questions is generally only known to experts; but all landlords and tenants feel themselves competent to express an opinion on *Adams* v. *Dunseath* (1).

The consequence is that the most widely divergent views have arisen in reference to it. It is said by some to have gone far to destroy the value to tenants of the Land Act of 1881, while others assert that it has not affected one way or other the amount of a single fair rent subsequently fixed. I need hardly say that I accept neither of these views. The first is so grossly extravagant as to be absurd; and the second takes no account of the important principles laid down in it which have since been acted on. As the decision was not wholly in favour of either landlord or tenant, neither class derived exclusive benefit from it; but both classes have had their rights and liabilities defined by it in important respects.

(1) 10 L. R. Ir. 109.

Amongst other things, it has settled, I think, the matter now in controversy up to a certain point. In reading the report of the case, one thing is to be observed. While the 2nd, 3rd, 4th and 5th questions formulated and answered by the Court embody in a somewhat different but more convenient shape, the requisitions of counsel and the matters submitted by the Land Commission for decision, the first question deals with a subject which does not appear to have arisen or been discussed at the hearing.

The reason of this is that there was nothing at that stage of the case to suggest it as a point of controversy. The parties had not seen the official valuer's report. Judgment was not given till long afterwards; and the experts who were examined on both sides dealt with the improvements, as they had been in the habit of dealing with them when compensation was claimed under the Act of 1870. They gave the then capital value of what had been expended; and little or no attention was paid to the increased letting value due thereto, probably because no one thought that would have materially affected the result. It was only when the judgments were read some time after they were delivered that it was found that two of the three Commissioners had adopted a view of the interest of the tenant in improvements, which had not been contemplated or discussed at the hearing. That this view had not affected the amount of the fair rent is shown by the circumstance that after the case was remitted from the Court of Appeal, it was only altered by the addition of £2 in respect of a house upon which no rent had been previously placed.

I presume, therefore, that the first question was a well-intended effort to correct a serious error in principle which, although immaterial in that particular case, might be the source of future injustice. I need hardly say that the answer given to it by the Court is binding on all Irish tribunals; and that everything said by individual Judges, if only in the nature of *obiter dicta*, is deserving of the most careful consideration.

The first question and answer go a certain distance towards ruling the present case. All the Judges held that "improvements" in the Act of 1881 means works which, being suitable to the holding, add to its letting value, as distinguished from the increased letting value itself; and that it is only in respect of

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such works that the tenant is relieved from rent by section 8, sub-section 9, of the Act of 1881. The deduction made by the Land Commission in the present case must be assumed to be a fair and reasonable return for the capital value of those works; and therefore the tenant is not entitled to anything more under the sub-section aforesaid. Three at least of the Judges, however, intimated that there may be a further question, namely, whether when the tenant has received the benefit of this sub-section he is not also entitled to share with the landlord in the increased letting value due to the improvements. This was then left undetermined, and is now to be decided. I have already given my reasons for holding that this point seems to me to involve the same question as arises in reference to the interest of the tenant in the holding generally. I think that this was the view of Sir Edward Sullivan, when he says, that after assessing a fair yearly allowance for the tenant's expenditure, the annual increased letting value that would remain after this is deducted should be dealt with by the Commissioners under the early part of the 8th section of the Act of 1881, with due regard to the interest of the landlord and tenant respectively. I think that it is also what Fitz Gibbon, L. J., refers to when he says:—"I do not desire to prejudge the question which is not now before us, but may hereafter arise; whether the tenant under the Acts of 1870 and 1881 has not an interest in his holding over and above his statutory tenure and his rights to compensation."

This was not involved in any of the questions answered by the Court; and I cannot regard it as decided one way or other in that case. Meredith, J., is of opinion that as far as the Land Commission is concerned the matter is closed by the series of cases that decided that no allowance or deduction in respect of occupation interest can be made from what would otherwise be the fair rent. I agree with him in this. I am prepared to adopt what he said in *Ripley* v. *Macnaghten* (1), recently before this Court (2), "that no such deduction can be made, whether it be conscious or unconscious, disclosed or undisclosed." My reasons can be stated in a few words. When the Act of 1881 provided that in fixing a fair rent,

(1) [1899] 2 Ir. R., p. 449. (2) *Blair* v. *Lord Gosford, ibid.*, 453.

the Court is to have regard to the interests of the landlord and tenant respectively, the Legislature referred to some interest known and legally recognised. It did not leave it to the discretion of the Land Commission to call into existence new interests. Before the Land Act of 1870, a yearly tenant could be dispossessed at any time by notice to quit; and as the consequence of quitting the holding was that he left behind without compensation all his expenditure upon it, and the *premium affectionis* that attached to it, such an uncertain tenure had no pecuniary value. The Act of 1870 entitled him to receive compensation for his improvement works on leaving, whether he left voluntarily or involuntarily. It thus conferred on him an interest in the holding which he had not before; and the Act of 1881, recognising this, gave the tenant the benefit of it in the manner already pointed out. But I know of no other interest conferred on him by either statute that can be had regard to in fixing a fair rent. The compensation for disturbance provided in the Act of 1870 only arose when the landlord evicted him capriciously; and ought not to be taken into account when fixity of tenure is secured to him. The idea of occupation interest originated apparently in a confused idea that this fixity of tenure is in itself a valuable interest. So it is, but it is not an interest for which the landlord ought to compensate the tenant; formerly the tenant paid the landlord by a fine or higher rent for a long term. Now the tenant is given a perpetual term without payment; but the fair rent of the holding, if it is not to be increased, is certainly not to be diminished on this account.

Since the argument our attention has been directed to the words "considering all the circumstances of the case, holding and district" which follow in the 8th section of the Act of 1881, the words "having regard to the interest of the landlord and tenant respectively"; and it has been suggested that the fact that the tenant had carried out a highly beneficial work on the lands is in itself a circumstance that may entitle him to share in the increased letting value due thereto. This view was certainly not referred to in the discussion before us, or, as far as I am aware, in the Land Commission Court; and, as I have said on former occasions, I have always a difficulty in deciding a case upon a point that

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has not been argued. After the best consideration I have been able to give, it seems to me that if the construction referred to is given to the sentence, it has the effect of enabling the Land Commission by the exercise of a purely discretionary power to confer at the expense of the landlord an interest or at least an advantage on the tenant which he is not entitled to under his contract and which is not given him by the Legislature. The words in question I think merely amount to a direction that all circumstances legitimately relevant to the determining of a fair rent are to be considered, and are nothing more than the expressions of a well-recognised rule for judicial guidance, which in their absence would have been implied.

Thus far I have considered the subject irrespective of the fact that the holding is subject to the Ulster Custom; and the result is that I have arrived at the same conclusion as the Land Commission. Ought this conclusion to be affected by the landlord's admission as to the Ulster Custom? His counsel have given several reasons for answering this question in the negative; but I confine myself to one. No evidence was given as to the particular form of the custom applicable to this holding; and the admission was general in its terms. Therefore, unless the Ulster Custom of which a Court of Law takes judicial notice, necessarily includes as one of its incidents, a right on the part of the tenant to have his fair rent fixed on a principle different from that which would apply in the absence of the custom, the landlord's admission would be immaterial. I understand the Land Commission to have decided that the Ulster Custom does not of legal necessity include this incident, and that therefore in the case before the Court its existence did not affect the rights of the parties. In this I agree. The Ulster Custom was often judicially considered between the years 1870 and 1881. Lawyers then found it to be much more hazy and nebulous than legislators had supposed. Its essential characteristic—the only one of which I am at liberty to take judicial notice—is that the tenant on quitting or being evicted from his holding is entitled, subject to restrictions, limitations, and conditions which vary infinitely, to sell to another the right to succeed him as tenant. There are or were (when sales under the custom were common) rules and

usages for the purpose of keeping down the price and reducing competition; and partly on this account and partly by reason of inexplicable variations in the amount paid, it was difficult to ascertain what the purchase-money represented in any particular instance. Rents in tenant-right districts were revised as frequently, if not more frequently than elsewhere; but I am unable to say, either judicially or otherwise, on what principle they were revised. It is not unlikely, however, that as the custom varied so much in other respects, it also varied in this. Meredith, J., said in his judgment, "Serjeant Dodd suggested that there were some estates in Ulster upon which the custom obtained of exempting from rent the entire of the increased letting value. We have never had proof of any such incident of the custom." I presume that the judicial Commissioner was speaking not only for himself but also for his colleagues who have been administering the Land Acts for years; and my own more limited experience corresponds with theirs. But Mr. Justice Meredith speaks of it as a matter of proof; and I infer that the conclusion he would arrive at would in each case depend upon the evidence offered therein.

In *The Queen* (*Lord Gosford*) v. *The Irish Land Commission* (1), the schedule prepared under the first section of the Act of 1896 set forth as one of the circumstances taken into account in fixing the fair rent the fact that the holding was subject to the Ulster Custom, but did not state that the amount thereof was thereby affected. I held in that case that the finding as to the existence of the Ulster Custom was immaterial as far as the fair rent was concerned, and that, therefore, the reference to it, although out of place and irrelevant, did not make the order void or illegal. I spoke then as I do now of the general Ulster Custom, of which I have judicial notice, and did not mean to convey that proof might not be given that some of the many usages prevalent under that name have the incident attached to them suggested by Serjeant Dodd.

As far as I can see there is no difference in this part of the case between the Land Commission and this Court.

The result then is that I concur with the Land Commission in holding that the only deduction or allowance to which the tenant

(1) [1899] 2 Ir. R. 399.

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is entitled is a fair and reasonable return for the present capital value of the money, labour and skill expended by him in carrying out the reclamation, that in calculating such return the increased letting value is not to be taken into account, except for the purpose of seeing that it is an improvement, or as evidence of the skill employed, and that subject to such deduction or allowance the landlord is entitled to a fair rent for the holding, including therein the increased letting value due to the improvement works. This, I think, is saying in other words that the tenant, having received the full benefit of the provision that exempts his improvements from rent, is to derive no further advantage from such improvements in the determining of the rent. I intimated at the beginning of these observations that I saw no ambiguity in the question submitted to the Court, taken in connexion with the rest of the case. I think that both the principles laid down and the mode of dealing with them are clearly stated. Certain explanatory figures are set forth, but with these this Court has no concern. It is our duty to examine whether the deduction made from the rent on account of improvements is ascertained upon right principles; but the Land Commission alone is given jurisdiction to fix its amount by the application of those principles, and it is quite immaterial whether it is called an annual allowance or "a just and liberal return," to use the words of FitzGibbon, L.J., in *Adams* v. *Dunseath* (1), or "a fair percentage," to quote Sir E. Sullivan in the same case.

Taking the view I do, I am in a position to give an unconditional and unqualified answer in the affirmative to the question submitted to the Court.

It is not for me to say to what extent I am thus differing from the joint judgment of the majority read by the Lord Chief Baron. Others can judge of this if they so desire, but whether the difference be great or little is a matter of purely speculative interest, as the guide for the Land Commission will be for the future the joint judgment.

SIR PETER O'BRIEN, L.C.J.:—

The answer to the question asked by the special case will be framed in the following manner:—

(1) 10 L. R. Ir. 109.

The Court is of opinion and doth declare—

1. That in fixing the fair rent of the holding the tenant was entitled in respect of the present capital value of his improvement works to such return, by way of annual allowance, as the Land Commission should determine to be fair, and sufficient to satisfy the provisions of the Land Law (Ireland) Act, 1881, section 8, sub-sect. 9.

2. That if the allowance so made was measured by way of percentage, merely upon the present capital value of the tenant's improvement works, or of his expenditure in moneys numbered, labour, and skill, and if, after the allowance so made, any surplus or balance of increased letting value due to his improvements remained, the Land Commission was bound to have regard, in dealing with such surplus or balance, to the matters hereinafter mentioned.

3. That in fixing the fair rent of the holding, and in dealing with the surplus or balance aforesaid, the Land Commission was bound to have regard to the interest of the landlord and tenant respectively, and to consider all the circumstances of the case, holding, and district, including the amount of such surplus or balance, and the sources from which the same was derived, treating the latent or dormant resources of the soil, as let by the landlord to the tenant, as the property of the landlord, and treating the development of those resources by the improvement as the act of the tenant.

4. That it was within the exclusive jurisdiction of the Land Commission, having due regard to the foregoing principles, to consider and determine whether, and in what proportions, the said surplus or balance should be divided between the landlord and the tenant in fixing the fair rent of the holding.

Accordingly the Court doth answer the question upon the special case in the negative.

Solicitor for the tenant: *J. K. Currie.*
Solicitor for the landlord: *Caruth.*

G. Y. D.

Kenny, J.
1899.

May 16.

PIRIE *v.* STEWART (1).

Fi. fa. — *Execution — Sheriff's fees, bailiff's and keeper's charges and expenses—Seizure withdrawn by the authority of the person who required the writ to be executed—Order LXV., Rule* 90*—Appendix S, Part IV.*

Where a sheriff, after a seizure of the execution debtor's goods under a writ of *fi. fa.* withdraws from possession by the authority of the person at whose instance he was required to execute the writ, he is entitled to bailiff's fee for executing the warrant, and bailiff's expenses while in possession of the goods. A writ is executed when the goods of the execution debtor are *in custodia legis*.

THIS was a civil bill appeal heard by Mr. Justice Kenny at the Belfast Spring Assizes of 1899. The facts appear from the judgment of the learned Judge delivered in Dublin on the 16th May, 1899.

W. M. M'Grath, for the plaintiff and respondent.

G. A. Hume, for the defendant and appellant.

KENNY, J. :—

This civil bill appeal was heard before me at the last Spring Assizes at Belfast. The action was brought by the plaintiff as sheriff of the county of Antrim for recovery of a sum of £2 for "sheriff's fees, bailiffs' and keepers' charges, and expenses incurred in executing a writ of *fi. fa.*, at suit of John M'Lean, against George Conn." The defendant is the solicitor for the plaintiff in that writ, John M'Lean ; and no question has been, nor indeed, having regard to Order LXV., R. 90, could be, raised as to the liability of the defendant for payment of the amount sued for, if the items composing it are under the circumstances recoverable. The Recorder of Belfast on the 15th September, 1898, made a

decree for the full amount claimed with costs and from that decree the present appeal was brought.

The sum of £2 claimed by the plaintiff is made up of 10*s.*, being the bailiff's fee for executing the sheriff's warrant, and 30*s.* for bailiffs' expenses while in possession of the goods seized.

The facts relating to the execution are as follows :—The *fi. fa.* in the present case was issued in an action of *M'Lean* v. *Conn* for £27 10*s.* 4*d.* It was lodged with the sheriff of Antrim prior to the 10th May, 1898. On the latter date the sheriff, in pursuance of that writ and of a civil bill decree that had been lodged with him previously to the *fi. fa.*, seized the goods of the defendant Conn. On the 11th May the landlord of the defendant Conn made a claim for £8, a quarter's rent, which claim, at the request of the appellant, Mr. Stewart, was verified by statutory declaration. On the same date the sheriff, by letter, intimated to the appellant—and I assume, though I have no note of it—also to the plaintiff in the civil bill decree, that the claim for rent had been made, and that he would withdraw unless the amount, £8, were lodged with him, in order to enable him to sell the goods which he had seized. It is clear that the sheriff apprehended that the value of the goods might not realize sufficient to cover the landlord's claim, and he took the course, usual on such occasions, of giving the execution creditors the opportunity, if they thought right, of proceeding to a sale: *Dixon* v. *Wilks* (1); *Needham* v. *Kelly* (2).

The plaintiff in the civil bill decree apparently declined to pay the landlord's claim, and the sheriff on the 11th May returned *nulla bona* in his case. On the same date the appellant wrote to the sheriff authorising him to withdraw on the execution-debtor handing him £10 on account. On the 12th May the sheriff, by letter, again intimated to the appellant that he would withdraw unless the amount of the rent was lodged. On the 13th May the appellant, by letter, authorised the sheriff to allow some of the goods belonging to a third person to be removed. On the same date the appellant wrote to the sheriff: "The goods would sell better where they sit than if removed. The plaintiff

(1) 9 Ir. C. L. R. 467. (2) 3 Ir. L. R. 181.

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will give your men any aid necessary to secure the back doors, &c., and as you have the key of the front one you can take your men away, and still hold the goods. This will save the men's time. If the defendant does not turn up to-morrow with cash, the plaintiff will either pay the rent or you can withdraw."

On the 14th May the execution creditor not having lodged or paid the landlord's rent, the sheriff withdrew, and subsequently made a special return on the writ of *fi. fa.*, setting out the facts.

Under the foregoing circumstances, is the sheriff entitled to the fees which he claims? Order LXV., Rule 90, provides that sheriffs may demand and receive the fees set forth in Appendix S, Part IV., in addition to poundage; and that these fees are to be payable on the execution or return of the writ. No. 6 in that Schedule is a fee of 10*s.* "for the bailiff for *executing* the warrant or writ if *executed* at a place not exceeding 5 statute miles from the sheriff's office." No. 8 is a sum of 5*s.* a day for each bailiff properly and necessarily left in possession of the goods while under seizure. No. 12 provides that in every case where expenses have been properly incurred by a sheriff for the purpose of executing a writ—if the same shall be settled, or shall for some reason, other than default on the part of the sheriff or his officers, be withdrawn by the person at whose instance the sheriff was required to execute the same, the sheriff shall be entitled to the expenses so properly incurred by him, to be paid by such person. There was no default in this case on the part of the sheriff or his officers, and the completion of the execution was prevented solely by the appellant, or his client the execution creditor, having declined or failed to lodge or pay the amount of rent claimed. But the sheriff did not withdraw without giving the appellant the fullest opportunity of considering his position, and, as a matter of fact, an express authority to withdraw was given by the letter of the 13th May. I am therefore of opinion that the execution was withdrawn by the person at whose instance the sheriff had seized, and that under the terms of No. 12 in the Schedule, the sheriff would be entitled to recover the amount sued for.

But the case was not argued before me on the question of withdrawal, but on the abstract right of the sheriff to those fees, on the ground that he had effected a seizure of the goods of the

defendant in the *fi. fa.*; that such seizure was an "*execution*" of the writ within No. 6, and if so, that the fee of 10*s.*, and also the fees at No. 8 were recoverable. For the defendant it was contended that mere "seizure" was not "execution of the writ," and that fees were payable to the sheriff only in case of a fruitful execution, and that the seizure was made, not under the *fi. fa.*, but under the civil bill decree. Dealing first with this latter p oint, there can be no doubt that when a sheriff, with several writs or decrees in his hands, makes a seizure, that seizure is for the benefit of all the execution creditors, though they obtain the benefits of it in the priority of the lodgment of the respective executions. If the sale of the goods seized realize more than sufficient to pay the first creditor's demand, the balance is attached to answer the remaining executions so far as it will extend. When therefore the first creditor in the present case declined to pay the rent, the sheriff was entitled to withdraw unless the next creditor came forward and expressed an intention of doing so, and thereby continuing the seizure for his benefit. In my opinion, the case on this point stands as if there had never been a seizure on behalf of the first creditor, and as if the only seizure was in respect of the claim of the appellant's client. I therefore think that the defendant fails on this point.

On the other and more serious question, the case is not without authority. In *Ryan* v. *Richardson* (1), which was decided on the corresponding Rule of 1885, there was a return by the sheriff of *nulla bona*, and Gibson, J., in holding that the sheriff was not entitled to the fee of 10*s.*, is reported to have said that "executed" meant an actual seizure. *Kirk* v. *Purchase* (2) was decided on the Rules of 1885, which contained no provision, such as that at No. 12 in the Schedule to the 1893 Rules, for the intervention of the Bankruptcy Court after seizure by the sheriff; yet the Queen's Bench Division held that where the defendant in the *fi. fa.* became a bankrupt after seizure, and the Court messenger took possession, the sheriff was entitled to his fees from the execution creditor. Again, in *Wren* v. *Stokes* (3), Ross, J., in dealing with the same item in the schedule, and the word "executed," expressed his

(1) 25 Ir. L. T. R. 24. (2) 32 L. R. Ir. 359. (3) [1897] 1 I. R. 451.

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opinion that "to satisfy these words something or somebody must be seized or taken or delivered in execution." That case went to the Court of Appeal, and no exception was taken to the judgment or language of Ross, J., and indeed I would gather from the observations of Fitz Gibbon, L.J., who delivered the judgment of the Court, that in cases of attachment he considered that the fee of 10*s.* would be payable when the arrest was made. If so, why should it not be payable in a case of a *fi. fa.* when the goods are seized? All the steps in the carrying out of an execution may be summed up in "seizure, sale, and levy," but in my opinion sale and levy are not necessary for a definition of execution. The writ is executed when the goods are in *custodia legis*. An "execution" in that sense is not an abortive one, and I need not add that it cannot come within the category of cases when the sheriff has returned simply *nulla bona*, and has thereby *prima facie* precluded himself from alleging that a seizure took place. I had to consider a case of that character at the Londonderry Spring Assizes, 1898 (*Ewart* v. *French*—Civil Bill Appeal), and I held that the sheriff could not recover, inasmuch as he had returned "*nulla bona*." In the case now before me the sheriff has made a special return, showing the seizure, and setting out the subsequent facts. The seizure in all these cases was regarded as an execution of the writ, though it was not completed by sale or levy, and the sheriff was held to be entitled to recover the fees which he had earned.

In accordance with these cases, in the principle of which I concur, I am of opinion that the plaintiff is entitled to succeed, and I accordingly affirm the Recorder's decree with costs.

Solicitor for the plaintiff and respondent: *A. J. Lewis.*

Solicitor for the defendant and appellant: *The defendant in person.*

J. M^c^G.

MONSERRATT *v.* SCOTT.

Gibson, J.
1899.
June 2, 5.

(1897. No. 2263.)

Action — Special jury obtained by the plaintiff — Verdict for defendant — Plaintiff without means — Personal liability of the plaintiff's solicitor for jury fees — Juries Act, 1871, *section* 37.

The plaintiff in this action served notice for, and obtained, a special jury. The jury found a verdict in favour of the defendant. It appeared in the course of the trial that the plaintiff was almost without means, and that she had given a mortgage to her solicitor, upon whatever property she had, to secure her solicitor's costs:—

Held, by the Judge at the trial (Gibson, J.), that he had jurisdiction, under the circumstances, to order the plaintiff's solicitor personally to pay the jury fees.

THIS action was tried before Mr. Justice Gibson and a special jury of the city of Dublin on the 2nd June, 1899. The plaintiff had served notice for and obtained a special jury. It appeared in the course of the trial that the plaintiff was almost without means, and that she had given a mortgage to her solicitor upon what property she had to secure his costs. The jury found a verdict for the defendant, and the learned Judge certified for a special jury. Thereupon counsel on behalf of the defendant applied to the learned Judge to order the plaintiff to pay the jury fees. The question subsequently developed in the manner stated in the learned Judge's judgment into a question as to the personal liability of the plaintiff's solicitor. His Lordship took time to consider the point, and delivered the following written judgment on the 5th of June, 1899.

R. R. Cherry, Q.C., and *John Wakely, Q.C.* (with them *James Chambers*), for the plaintiff.

Serjeant Dodd, and *The Rt. Hon. The Mac Dermot, Q.C.* (with them *William Moore, Q.C.*), for the defendant.

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June 5.

GIBSON, J. :—

The plaintiff having served notice for a special jury, and the verdict being for defendant, Serjeant Dodd applied to me, under the 37th section of the Juries Act, 1871 (which reproduces the language of earlier statutes), to direct that the plaintiff should pay the jury. Plaintiff's counsel disputed the application of the section, but it was agreed that provisionally the plaintiff's solicitor should pay 11 guineas, defendant undertaking, if I should not decide the point in his favour, to refund the money. The jury was paid. After Serjeant Dodd had left, it was suggested that the point intended to be raised was the personal liability of the solicitor. The plaintiff has no means, and her solicitor has obtained a mortgage and charge to secure his own costs, so that payment by the plaintiff is out of the question. There are, therefore, two points for decision. Is the plaintiff liable? If she is, can her solicitor be required to pay. As to the first point, apart from authority, I think the section clearly imposes the liability. Any possible doubt is removed by such authorities as *Johnston* v. *Midland Great Western Railway Company* (1), *Brophy* v. *Jones* (2), *Kerr* v. *Midland Great Western Railway Company* (3), *Kehoe's Case* (4), and *Finchan's Case* (5). The only difficulty I have felt was as to the second point. If the plaintiff had obtained a verdict which would not carry costs, I think the solicitor could have been ordered to pay the fees. The jury must be paid on the spot; the fees are not costs, but, as explained by Pennefather, B., in 2 Jones at p. 377, are expenses necessary to bring the case to trial. Accordingly it was held by Wills, J., in *Bakewell* v. *Cornish* (Times, November 24, 1886) (6), that the solicitor could be required to pay the jury. In *Caldecott* v. *Lord Pembroke* (7), the attorneys were ordered to pay the fees. This authority was approved of in *Attorney-General* v. *The Lord Primate* (8) which closely touches the present case. There the Crown obtained a special jury, but a verdict was returned for defendant. The solicitor for the Crown

(1) 3 Ir. C. L. R. 251.
(2) 8 Ir. C. L. R. 240.
(3) 10 Ir. C. L. R. App. xiv.
(4) 20 Ir. L. T. 27.
(5) 27 Ir. L. T. 78.
(6) See Cordery on Solicitors, 3rd ed., p. 141.
(7) 2 Shower, 248.
(8) 2 Jones, 362.

was ordered to pay for the special jury obtained by him on behalf of his client.

I think that there is jurisdiction to compel the solicitor, an officer of the Court, to pay jury fees which his client, if he had the means, should have paid, and that the circumstances of this case make it right to require him to pay. Suppose the case of a pauper plaintiff and a wealthy defendant who obtains a special jury and is defeated. Has not the Court power to enforce payment of the jury fees from the solicitor representing the defendant, who may not be present in Court (as in case of a Company or an absentee owner)? I am of opinion that the solicitor is not entitled to have the fees refunded. At the time the money was paid and the undertaking given I had no idea that any question, save the construction of the section, was intended to be raised, but I accept the statement of plaintiff's solicitor that what was present to his mind was the question of personal liability.

Solicitor for the plaintiff: *T. Falls.*
Solicitors for the defendant: *Webb, Scott & Seymour.*

J. M°G.

Gibson, J.
1899.

March 9.
April 21.

LINDSAY *v.* MAGUIRE.

Loan Fund Act (6 & 7 *Vict. c.* 91)—*Statutory loan by Loan Fund Society—Renewal of outstanding note—Unauthorized advance—Remedy by civil bill—Statute of Limitations.*

Though a renewal note cannot be enforced under the Loan Fund Act, an action can be maintained by the trustees or receiver upon the original consideration, where the primary note cannot be enforced before Justices; and payments made on foot of invalid renewals, can be utilized to keep alive the original liability.

Civil Bill Appeal. This, and six other appeals, from decrees of his Honour the County Court Judge of Fermanagh, on civil bills for money claims on foot of loan-fund notes and for money lent, were heard before Mr. Justice Gibson at the Spring Assizes, 1899, for county Fermanagh. His Lordship disposed of the other cases at Assizes, holding that the notes sued on were intended and understood to be renewals of outstanding notes; that, though there was a colourable form of payment before the notes sued on were passed, these supposed payments were contrivances to conceal the fact of renewal (1); and that the notes must be treated as renewals and unenforceable; that the plaintiffs therefore, in order to succeed, must fall back on the original consideration, and show (*a*) what the consideration was, and also show (*b*) that the original loan was unauthorised; as, if authorised, the first note given should be sued on, and sued on before Justices, as held by Fitz Gibbon, L.J., in *Armstrong* v. *Orr* (2). His Lordship was of opinion that

(1) The common practice was this: The borrower, when his original note (say for £10) fell due, would come to the office of the society; pay the fines (if any) in cash; borrow £10 from X, a go-between; pay his debt to the society therewith; obtain a "further" loan from the society, and give them a "new" note; and, with this further loan, repay X his temporary advance of £10.—[Rep.].

(2) 31 Ir. L. T. R. 118.

the plaintiffs in these six cases failed on one or other of these points, and reversed the decrees appealed from.

In the present case the original debt was over twelve years old, and the borrower resided outside the prescribed district. New notes (really renewals) were passed from time to time, and fines and prospective interest paid on each occasion by the defendant. The action was brought by the receiver appointed over the Society's assets.

Denis Henry, Q.C., for the plaintiff.

P. Law Smith, for the defendant.

Judgment was reserved and was delivered in Dublin.

April 21.

GIBSON, J.:—

In this case, where the borrower lived outside the Loan Society's district, two questions are involved. Is the original advance recoverable by action? and, if it be, is the remedy barred by the Statute of Limitations? The first point was not argued, and I think that, notwithstanding the opinion of Lord Blackburn in *Att.-Gen.* v. *Great Eastern Railway Co.* (1), following *Ashbury Ry. Co.* v. *Riche* (2), the action is maintainable. *Re Coltman* (3) supports this conclusion. The main question is that on the Statute of Limitations. Each note was represented as being for a new advance, a form of payment being gone through. The several payments were formal and collusive contrivances to evade the Loan Fund Act, and I think the several notes ought to be regarded as in substance renewals. As renewals, and also as being for an unauthorised loan, the notes, being unstamped, cannot be given in evidence to prove a legal promise to pay. The plaintiffs, therefore, have to rely on alleged payments on account. On each note, made as if for a fresh advance, prospective interest was charged under section 27 of the Loan Fund Act. Can this payment, exacted by successive officers of the society, be utilized to keep alive the original liability? For the plaintiffs it is argued that each note was a security; that the borrower, unless he made the

(1) 5 App. Cas. p. 481. (2) L. R. 7 H. L. 653. (3) 19 Ch. D. 64.

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1899.

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payment, would not have got time; and that, if the note was a renewal, the payment admits the debt, and implies a promise to pay. On the other hand, for the defendant, it is urged that the payment was on foot of the new note which was substituted for the previous liability; that the original debt was treated as extinguished; and that no promise to pay the original debt can be inferred.

The effect of payment in preserving the right to sue is clearly explained by Parke, B., in *Davies* v. *Edwards* (1), and by Blackburn, J., in *Morgan* v. *Rowlands* (2). The payment must be such as to warrant an inference (in fact, not merely in law) of a promise to pay the balance. Though the form of payment was gone through, and though the parties believed that the original indebtedness was replaced by the new note, the substance of the transaction was a renewal. It seems hard that payments on the basis that the renewals were valid cannot be used to keep the debt alive. The question is one of difficulty, and I regret that the parties have not taken a case stated. I have come to the conclusion that the plaintiffs can sue on the original consideration as an existing enforceable debt. The civil bill relies on the consideration as an alternative cause of action. If the original note had been regular and authorised, payment should have been enforced by summons before Justices. The plaintiffs ought not, by violating the statute, to be allowed to get more costs than could be awarded if the note was regular. The society was for a charitable object: *Madden* v. *M'Mullen* (3). I shall affirm the decree so far as regards the consideration, with 2*s*. costs in the Court below, and without costs of appeal.

Solicitor for the plaintiff: *C. Falls.*
Solicitor for the defendant: *W. F. Wray.*

A. E. R. J.

(1) 7 Ex. 22. (2) L. R. 7 Q. B. 493. (3) 13 Ir. C. L. R. 305.

JOHN KELLY, TENANT; CAPTAIN E. S. M. SHELTON, LANDLORD. P. M'VEIGH, TENANT; CAPTAIN BOND SHELTON, LANDLORD (1).

Land Com. 1899. Jan. 13.

Landlord and tenant—Land Law (Ireland) Acts, 1881–1896—*Fair rent—Agreements and declarations fixing—Taking off the file—Rules, Dec.*, 1883; *Rule* 116.

The Court directed agreements and declarations fixing fair rents, which had been altered after signature by the tenants, and had not been lodged within one month, to be taken off the file.

APPLICATION on behalf of the tenants, that the originating agreements and declarations, fixing fair rents on their holdings, and purporting to be dated the 3rd April, 1886, and filed the 30th July, 1886, should be set aside on the grounds:—1. That the said agreements were not filed in the Land Commission within one month of the making thereof. 2. That the said agreements were altered in a material respect between the date of the execution thereof and their transmission to the Land Commission; and, 3, That the said agreements were void and of no effect. The facts appear in the judgment.

W. M. Whitaker, for Kelly and M'Veigh, tenants, cited *Murray, Tenant; Scottish Provident Institution, Landlords* (2); *Pakenham* v. *M'Clurg* (3); *Lynch* v. *Loughrey* (4).

R. F. Harrison, for the landlords.

MEREDITH, J.:—

In these two cases there can be no doubt that a very improper course was taken by someone who represented the landlord of the holdings in 1886. It is plain upon the affidavits that in 1884

(1) Before MEREDITH, J., and the HON. G. FITZ GERALD, Q.C., Commissioner.
(2) [1894] 2 I. R. 44. (3) Unreported (4) 23 Ir. L. T. 365.

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the then landlord and the then tenants entered into agreements under section 8 of the Act of 1881 to fix the fair rents of the two holdings with which we are dealing. One of the agreements was undoubtedly executed by the tenant in the month of December, 1884; the other agreement was executed by the tenant at some date in 1884, it is not quite clear whether in the month of June or December. The agreements were also executed by the landlord, and, according to the rules of Court, should have been lodged within one month from the date of their execution. The then solicitor for the landlord, as I gather from the affidavits, was also the agent of the estate, and he appears to have forgotten all about the agreements, and the necessity for lodging them within the prescribed period. The agreements, however, were acted upon, and the rent received from the tenants as if those agreements had been duly lodged and filed. In April, 1886, the agent seems to have wakened up, and he, or someone acting on his behalf, unquestionably altered the date of the original agreements which had been signed by landlord and tenant in 1884. In Kelly's case he erased the date December, and the figure 4 (in 1884), and he substituted April, 1886, and in the second case a similar alteration was made. That, as a matter of fact, he, or some person by his direction, made this change, we have no doubt. One does not require to be an expert to see that the alteration was made after the signature of the landlord was affixed to the document. Portion of the landlord's actual physical signature has been erased for the purpose of effecting this alteration. The object of the alteration is perfectly plain and clear; it was to enable the agent to get rid of the effects of his own negligence in not lodging the documents within the prescribed period of one month. The alterations were made without consulting the tenant; and the official in the Land Commission Court, who ought to have called attention to the erasure, and ought to have inquired as to how it came to have been made, passed it over. I can well understand how an official might easily, having regard to the parties to this transaction, think it was not necessary to suggest that any improper alteration had been made, and might have thought himself justified in accepting the agreements. But I wish it to be clearly understood that no document ought to be filed as an original document in our Court which

contains any alteration or interlineation of a character going to the root of, or being in any sense a material part of, the document, and that, whether the document be an originating agreement and declaration fixing a fair rent, or any other document, if it contains alterations or interlineations of a material character which are not initialled by the parties, it ought not to be received or filed until the alterations or interlineations have been explained and verified. However, as happened in other cases, the suspicions of the officials were not aroused, and the documents were received and filed, and they have lain on the files of the Court from that day to this. The present tenant, in entire ignorance that the date had been changed, and that the agreement which his predecessor had executed was not a binding agreement, never having been filed, and that an agreement which he had never executed, creating a statutory term which he had never agreed to, had been put upon the files, served an originating notice to fix a fair rent. The present landlords and the present agent were, and are, at least they were until this motion was instituted, in absolute and entire ignorance of what had been done in the lifetime of the former agent. We entertain no doubt whatsoever upon that point; but they were aware that an agreement had been entered into between the former landlord and the former tenant; and they applied for and obtained in good faith certified copies of the agreements which were upon the files of the Court. Of course anyone receiving a certified copy of the agreement purporting to bear date 3rd April, 1886, and apparently regularly filed, could have no suspicion as to the validity or authenticity of the document, and accordingly the landlords, on the assumption that that document was correct, thought the tenant was premature in applying to have a fair rent fixed for a second statutory term. In Kelly's case the present landlords produced the agreement in Court, and obtained from the Sub-Commissioners an order dismissing the originating notice as premature. In M'Veigh's case the circumstances are practically identical; the landlord obtained a certified copy; he did not receive in time for the Sub-Commission, but he referred to it in his notice of appeal.

We absolve the present landlords and their agent and those who produced the order before the Sub-Commission, or referred to the agreement in the notice of appeal, from all charge of anything

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savouring of impropriety in the matter; they are not in any way responsible for the acts of the former agent. The former agent is dead and cannot explain to us the circumstances under which he took this very extraordinary course. But the tenants, on the other hand, had no option but to come to this Court when they discovered the circumstances—to come before the expense of appeals in each of the cases had been incurred—and to say, "a great mistake has been made and a great injustice done to us; there is no such agreement as that produced by the landlords before the Sub-Commission; there is no such agreement as that referred to in the landlord's notice of appeal; the agreements executed by the former tenants were executed in 1884; they were not lodged or filed within the prescribed time; they can never be filed in this Court now, because they have been altered in a most material respect, namely the date which regulates the statutory term." I entirely agree with that argument on behalf of the tenants; I think they are entitled to have it declared by this Court, that the tenants never entered into these agreements and that they were improperly filed; if the facts had been known they never would have been filed, and having heard the facts, we ought not to retain them upon the files of the Court for a single hour. We direct that the document in each case shall be taken off the file. There remains the question as to costs. It seems hard that the landlords in this particular case under the particular circumstances should have to bear the costs occasioned by the sins of the agent of their predecessor, but what right have we to impose these costs on the tenants? The tenants are absolutely innocent in the matter, they were right from beginning to end, and they ought not to have been compelled to make this application at all. It has no doubt been rendered necessary by the act, not of the present landlords, but of the agent of their predecessor. But the position taken up by Mr. Whitaker is, I think, the true one; the landlords have taken advantage—unwittingly and unknowingly taken advantage—of a spurious document; they were not aware of the circumstances, but it very often happens that a man innocently puts forward a case which ultimately involves him in a very considerable cost and expense. I think that is really the position of affairs here. The landlords have made use as against the tenants of documents which they were not entitled to

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make use of. The tenants had to come to the Court to get rid of the effects of those documents, and therefore we think they are entitled to be indemnified against the costs of the application which, under the circumstances, they had no option but to make. The two cases ought to have been only one case; it does not seem to us there was the least necessity for having two separate applications, and we will give the costs of one application only, and fix the amount at three guineas.

Solicitors for the landlords: *Murland & Co.*

Solicitors for the tenants: *S. B. Martin*, and *Bell & M'Cartan.*

W. C. S.

IN RE SHERLOCK'S ESTATE (1).

Land Com. 1898.

June 13, 14. Nov. 12.

Appeal. 1899.

Jan. 13, 19.

Landlord and tenant—Land Purchase Acts—Sale to tenant—Joint application by landlord and tenant for advance by Land Commission of purchase money—Death of landlord—Subsequent sanction of advance—Conversion—Land Law (Ireland) Act, 1881 (44 & 45 *Vict. c.* 49), *s.* 24—*Purchase of Land (Ireland) Act*, 1885 (48 & 49 *Vict. c.* 73), *ss.* 2, 3—*Land Purchase Rules (October*, 1885), *Form No.* 1.

By document in Form No. 1, Land Purchase Rules (October, 1885), an owner in fee of land offered to sell the same to the tenant thereof for a definite sum, which was to be paid by an advance from the Land Commission of that amount under the Purchase of Land (Ireland) Act, 1885 (48 & 49 Vict. c. 73), one-fifth of the advance to be retained as a guarantee deposit under the Act; and by the same document the tenant accepted the offer, and agreed to purchase the holding for the said sum, and requested the Land Commission to advance the same, and agreed that the sale should be carried out by conveyance. This document was signed by the landlord's agent and by the tenant, and was lodged with the Land Commission; soon afterwards the owner died, having by will, made some years previously, devised the lands to his wife for life, with remainder to his two sons, and appointed one of the sons residuary legatee. After the owner's death the Land Commission sanctioned the advance. The sale was carried out by a conveyance from the widow and sons (conveying as "beneficial owners"), which recited the devise, and not the residuary bequest, and that the purchaser held as tenant to them. The Land Commission for several years, with the concurrence of the residuary legatee, and sometimes on his application, dealt with the sale moneys and guarantee deposit on the basis that the devisees were entitled thereto. The son who was not the residuary legatee had died

(1) Before MEREDITH, J.

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intestate, leaving a widow and several infant children, and limited letters of administration to his estate had been granted to the residuary legatee before the distribution of the sale moneys:—

Held, by Meredith, J., that there was no binding contract for sale at the death of the testator capable of being specifically enforced; that the document (Form No. 1) was a joint application by the landlord and the tenant for an advance to enable them *to enter into a contract* for sale; that this application was to be regarded not as an application to a Court, but as an application to the Land Commission endowed with, and exercising, the powers formerly exercised by the Board of Works, and the landlord as offering by that document to become surety for the tenant to the extent of the guarantee deposit; that in one sense it was a conditional contract, but that the condition was that the advance was to be made upon the joint application of a living landlord and a living tenant, and that when the testator died the conditional contract died with him, the condition became impossible of fulfilment, and the Land Commission had no jurisdiction to accept the offer, or make an order on the joint application, or continue the proceedings: that on the facts the devisees had not adopted the contract of the testator with the object of carrying out that contract, and that contract alone; that the parties did not intend to set up the contract of the testator in such a way as to effect a conversion as between the real and personal representatives relating back to the testator's lifetime, but that the devisees finding that the Land Commission were willing to advance the money, entered into a contract with the tenant, and conveyed to him, giving him the same terms as the testator was willing to give; and, *held*, that there was no conversion.

Held, by the Court of Appeal (Fitz Gibbon and Walker, L.JJ.; Holmes, L.J., *dissentiente*), that the residuary legatee having for several years dealt with the matter on the basis that the lands had passed as land to the devisees, and having carried the sale out on this assumption, could not be allowed to contend that the lands had been converted in his father's lifetime, so as to capture the purchase-money as personalty under the residuary gift as against the children and widow of his deceased brother, whose interests, as his brother's limited administrator, he was bound to protect.

Per Holmes, L.J. The application for an advance in the prescribed form when sanctioned effected a conversion of the lands.

QUESTION of law arising under the Land Purchase Acts submitted by Lynch, Commissioner, for the hearing and determination of the Judicial Commissioner, pursuant to the Purchase of Land (Ireland) Act, 1891 (54 & 55 Vict. c. 48), section 28 (8).

Edward R. O'Farrell, being seized in fee of one undivided fourth part of the lands of Tinnehalla, Retagh, and Brownswood, situate in the county of Waterford, subject to three life annuities,

by his will dated the 17th of January, 1882, devised and bequeathed all his estate and interest in the lands of Tinnehalla and all other property in the county of Waterford to his wife Christina O'Farrell for her life, and after her death to his two sons, Nicholas Sweetman O'Farrell and Edward Joseph O'Farrell, their heirs, executors, administrators, and assigns, in equal shares as tenants in common, and after leaving specific and pecuniary legacies, which latter he charged on Tinnehalla, the testator devised and bequeathed all the rest of his property to the said Edward J. O'Farrell, and appointed him sole residuary legatee, and appointed the said Christina O'Farrell and Edward J. O'Farrell his executors.

Anne Sherlock was the owner, subject to incumbrances, of the remaining three-fourths of the said lands.

The said Edward R. O'Ferrall and Anne Sherlock negotiated for the sale of the lands to the occupying tenants under the Purchase of Land (Ireland) Act, 1885 (48 & 49 Vict. c. 73), and applications dated the 22nd of December, 1886, in Form No. 1 Land Purchase Rules (October, 1885), signed by certain of the tenants of the said lands, and by the agent of the testator and the said Anne Sherlock, were lodged with the Land Commission. These applications were similar in form. That dealing with the holding of Patrick Butler was, so far as material, as follows :—

PURCHASE OF LAND (IRELAND) ACT, 1885.

APPLICATION BY LANDLORD AND TENANT FOR AN ADVANCE.

I, Edward Mansfield, authorized agent of Anne Sherlock and Edward R. O'Farrell, the landlord of the holding described in the schedule below, hereby offer to Patrick Butler, the tenant in occupation thereof, to sell to him the said holding for the sum of £306, inclusive of all expenses incidental to the purchase, which sum is to be paid in the following manner :—

By an advance from the Land Commission of £306.

FIRST SCHEDULE—DESCRIPTION OF HOLDING.

* * * * * * * *

A guarantee deposit of £62, being not less than one-fifth of the price of above holding, is to be retained by the Land Commission when making the advance.

Dated this 22nd day of December, 1886.

Signed by the landlord or his agent, EDWARD MANSFIELD.

Postal address, *Kilsheelan, Clonmel.*

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I, Patrick Butler, judicial tenant in occupation of, and residing on, the holding above described, accept this offer, and agree with the said Anne Sherlock and Edward R. O'Farrell to purchase from him my said holding for the sum of £306. I request the Land Commission to advance me the sum of £306, to be repaid by an annuity of £4 for each £100, and so in proportion for any less sum, for forty-nine years; and I agree that the sale shall be carried out by means of a conveyance, and I undertake to execute to the Commission the necessary deed to secure the repayment of the advance. I am in the actual occupation of the said holding, and my interest therein is not subject to any incumbrances.

Dated this 22nd day of December, 1886.
Signed, &c.

* * * * * * * *

After the completion of the purchase applications an agreement, embodying the terms on which the sale had been arranged, to be executed by the owners and the incumbrancers on Anne Sherlock's three-fourths of the property, was prepared by the owners' solicitor and submitted to and approved by the solicitor for the incumbrancers. It was executed by Anne Sherlock and by most of the incumbrancers, but owing to delay in the execution by one of the latter it was never sent to Edward R. O'Farrell or his incumbrancers for execution. It was dated by the solicitor as of the 24th January, 1887. The agreement provided that Anne Sherlock and Edward R. O'Farrell should sell to the tenants thereof, pursuant to the Act of 1885, the lands of Tinnehalla and Retagh, discharged from the incumbrances, at the rate of fifteen years' purchase of the rents, and should sell Brownswood in like manner at eighteen years' purchase. It provided that the Land Commission should retain in accordance with the Land Purchase Acts, one-fifth of the advance as a guarantee deposit, and it contained provisions as to the application of the purchase-money amongst the parties; and for securing the amount of interest to be paid by the tenants on the purchase-money by promissory notes. This part of the agreement is fully stated (*infra*, pp. 593, 594) in the judgment of Fitz Gibbon, L. J.

Edward R. O'Farrall died on the 31st of March, 1887. Probate of his will was granted to Edward J. O'Farrell on the 14th of February, 1888, power being reserved of making a like grant to Christina O'Farrell.

The following indorsement, dated the 9th September, 1887, on the agreement of the 24th January, 1887, was signed by Christina O'Farrell, Nicholas S. O'Farrell, and Edward J. O'Farrell:—"Since the date of the within deed, and before executing same the within named Edward R. O'Farrell died, and by his will, dated the 7th day of January, 1882, he devised, *inter alia*, the within-mentioned lands and premises to his wife Christina O'Farrell, for her life, and after her death to her two sons Nicholas Sweetman O'Farrell and Edward Joseph O'Farrell, in equal shares, as tenants in common, and he appointed his said wife and said Edward Joseph O'Farrell executrix and executor respectively of his said will. Now we the said Christina O'Farrell, Nicholas Sweetman O'Farrell, and Edward Joseph O'Farrell, do hereby assent to, and confirm, the within indenture in all respects, to the intent that it may be as effectual and as binding as if same had been executed by the said Edward R. O'Farrell previous to his death, and we agree to do all necessary acts to carry its terms into execution."

On the 5th April, 1887, the advances were sanctioned by the Land Commission in all but one case, and in this one case the advance was sanctioned shortly afterwards.

One of the annuitants died prior to the negotiations for sale, and on the 30th July, 1888, an order was made that the said lands should be indemnified against the remaining annuities by certain other lands, and that, as soon as the advances should have been made, the sum of £1500 should be retained out of the proceeds of the said sales, and be placed to the credit of the matter, and separate credit of the owners, save Anne Sherlock, as a further indemnity against the annuities.

The abstract of title was headed, "Abstract of title of Mrs. Anne Sherlock, Mrs. Christina O'Farrell, Nicholas Sweetman O'Farrell, and Edward Joseph O'Farrell." It set out the will of Edward R. O'Farrell, stating the devise to Mrs. O'Farrell for life, with remainder to her two sons, but making no mention of the residuary gift.

The rulings on title required that Mrs. O'Farrell, as tenant for life, should convey under the Settled Land Acts, and that trustees for the purpose should be appointed. The requisition was met by getting Nicholas S. O'Farrell and Edward

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J. O'Farrell to join with the tenant for life and convey as "beneficial owners."

The sales were completed in August, 1888, in the names of Anne Sherlock, Christina O'Farrell, Nicholas S. O'Farrell, and Edward J. O'Farrell as vendors. The particulars of the conveyance to Patrick Butler are stated in the judgment of Meredith, J. (*infra*, pp. 574, 575.)

The £1500 retained under the order of the 30th July, 1888, was invested in £1131 Dublin, Wicklow and Wexford Railway 4¼ per cent. debenture stock, which was placed to the credit of the matter and separate credit of Christina O'Farrell, Nicholas S. O'Farrell, and Edward J. O'Farrell.

On the 11th April, 1890, a ruling was made on the application of the last-named parties that the dividends on the stock should be paid to them.

Nicholas S. O'Farrell died intestate on the 14th November, 1891, leaving a widow and six children. Limited letters of administration to his estate were granted to Edward J. O'Farrell.

The second annuitant died on the 3rd January, 1894.

Christina O'Farrell died intestate on the 16th February, 1894.

The third annuitant died on the 12th March, 1895.

The total amount of the guarantee deposits retained by the Land Commission was £2746, and the sum of £686 10*s.*, being one-fourth thereof, stood in the register of guarantee deposits in the names of Christina O'Farrell, Edward J. O'Farrell, as limited administrator of Nicholas S. O'Farrell, and the said Edward J. O'Farrell. (See further the judgment of Meredith, J., *infra*, page 578.)

Edward J. O'Farrell applied to Mr. Commissioner Lynch, that he should be declared absolutely entitled in his own right, as residuary legatee under his father's will, to the said debenture stock, and that the same and the sum of £186 3*s.* 2*d.* interest due thereon, and any further interest should be transferred and paid to him, and that the names in which the said sum of £686 10*s.* was standing in the register of guarantee deposits should be changed, and that the said sum should stand in his name alone, and that he be declared absolutely entitled thereto as soon as the purchasers had repaid, on foot of their advances, sums equal to the said guarantee deposit,

and that the interest due and to accrue due thereon should be paid to him.

The Commissioner submitted the question of law—whether the Land Purchase agreements had worked a conversion of the estate—for the determination of the Judicial Commissioner.

Price, Q.C. (with him *Brunskill*), for Edward J. O'Farrell :—

The advances having been sanctioned and the sales carried out, the agreements for sale operated to convert the estate as from their dates : *In re Walsh* (1) ; *Weeding* v. *Weeding* (2) ; *Frayne* v. *Taylor* (3). See also the judgment of Jessel, M.R., in *Lysaght* v. *Edwards* (4), commenting (pp. 516, 517) on *Wall* v. *Bright* (5), and referring (pp. 520, 521) to *Lawes* v. *Bennett* (6) and *Whittaker* v. *Whittaker* (7). See further 1 White and Tudor, L.C., 7th ed., notes to *Fletcher* v. *Ashburner*, pp. 341, 353-356 ; 1 Jarm., Wills, 5th ed., p. 52 ; Dart, V. and P., 6th ed., pp. 295, 296.

[*Kelly* v. *Enright* (8) was also referred to.]

Serjeant Campion, Q.C., and *Wakely*, for the children of Nicholas S. O'Farrell :—

When Edward R. O'Farrell died there was no final or complete contract. Neither party could enforce it, and where an action does not lie for specific performance there can be no conversion. Section 22 of the Land Law (Ireland) Act, 1887 (50 & 51 Vict. c. 33) shows inferentially that an agreement for sale under the Land Purchase Acts is not complete until the advance has been sanctioned by the Land Commission. *In re Walsh* (1) has no application. In that case the advance was sanctioned before the death. There could be no conversion until the advance was made : *Re Bateson's Estate* (9), and the judgment there (p. 93) of Bewley, J. *Frayne* v. *Taylor* (3) does not on this point apply ; there the contract was final and complete from the beginning ; the only defect was a want of compliance with the Statute of Frauds, but

(1) M'Carthy's Land Purchase Cases, 100, 102.
(2) 1 J. & H. 424.
(3) 33 L. J. (N. S.) Ch. 228.
(4) 2 Ch. D. 499.
(5) 1 Jac. & W. 494.
(6) 1 Cox Ch. Cas. 167.
(7) 4 Bro. C. C. 31.
(8) 11 L. R. I. 379.
(9) 29 Ir. L. T. R. 90. Also reported [1895] 2 I. R. 559.

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that did not detract from the contract itself; it amounted to want of proper evidence only; see the judgment in that case of Kindersley, V.-C., p. 231. Here the contract was never complete. *Weeding* v. *Weeding* (1) was the case of a simple agreement between two parties, one of whom had an option of purchase. Here there is not merely an agreement between two parties, but a transaction between landlord and tenant on the one hand, and the Land Commission on the other. The Land Commission might have declined to sanction the advance, or might have sanctioned a lesser sum than that proposed: the amount of the purchase-money was uncertain, and the contract was not final at the testator's death. Such a case is quite different from that of a lease with an option of purchase. The same principles apply as in cases of compulsory purchase—that until the purchase-money is ascertained there is no valid enforceable contract and no conversion. See *Re Battersea Park Acts* (2); *Coyne* v. *Coyne* (3). The indorsement on the deed of the 24th January, 1887, expressly recognises the devise in the will; all the parties dealt with the property on the basis that it belonged to the widow for life, with remainder to the two sons, and the residuary legatee is bound: *Frayne* v. *Taylor* (4). The sanction of the Land Commission cannot relate back so as to work a conversion from the date of the agreement: *Edwards* v. *West* (5); *Townley* v. *Bedwell* (6); 1 White & Tudor, L.C., 7th ed., 356.

Brunskill, in reply:—

The agreement could have been specifically enforced in the testator's lifetime, subject to the Land Commission's subsequent sanction of the advance: *Kelly* v. *Enright* (7). The document of the 22nd December, 1886, is an unqualified offer by the landlord, and an unqualified acceptance thereof by the tenant, coupled with an application by the latter to the Land Commission to advance the purchase-money. *Re Bateson's Estate* (8) is not an authority for the other side. Bewley, J., there (p. 93) says that in cases carried out

(1) 1 J. & H. 424.
(2) 32 Beav. 591.
(3) I. R. 10 Eq. 496.
(4) 33 L. J. (N. S.) Ch. 228.
(5) 7 Ch. D. 858.
(6) 14 Ves. 591.
(7) 11 L. R. I. 379.
(8) 29 Ir L. T. R. 90; [1895] 2 I. R. 559.

by conveyance the conversion of the land into money is effected by the act of the parties. The judgment on this point in *In re Walsh* (1) is based on the fact that there was a binding contract; that, and not the sanction, was the potent factor. See also *Curre* v. *Bowyer* (2), and 2 Wms. Exors., 9th ed., 1644, 1645. The cases with reference to compulsory purchase do not apply; there the price was not fixed, whereas in the present case the contracts were to sell for definite sums. This is the case of contracts for sale entered into by the testator, which were subsequently carried out by the devisees, and the purchase moneys are personal estate and belong to the residuary legatee: *Frayne* v. *Taylor* (3).

MEREDITH, J.:—

Nov. 12.

This case came before me as Judicial Commissioner on a reference from Mr. Commissioner Lynch to determine an interesting and important question of law involving the ownership of a considerable sum of money. The application made to Mr. Commissioner Lynch on behalf of Mr. Edward J. O'Farrell, one of the vendors named in the title, was for an order to the following effect, viz., that the said Edward J. O'Farrell may be declared absolutely entitled in his own right as residuary legatee under the will of his father Edward R. O'Farrell, deceased, to the sum of £1131, Wicklow and Wexford 4¼ per cent. debenture stock, now standing to the credit of this matter and the separate credit of Christina O'Farrell, Nicholas Sweetman O'Farrell, and Edward Joseph O'Farrell; and that inasmuch as Catherine O'Ryan and Dorothea O'Ryan, two annuitants, are both dead, that sum of stock together with the dividends thereon, may be paid out to the said Edward J. O'Farrell; and for a further order that the names in which the guarantee deposit is now standing in the register of guarantee deposits be changed, and that the guarantee deposit may hereafter stand in the name of the said Edward J. O'Farrell alone instead of the names of Christina O'Farrell, Edward J. O'Farrell as limited administrator of Nicholas S. O'Farrell and Edward J. O'Farrell, and that Edward J. O'Farrell be declared absolutely entitled thereto, as soon as the purchasers liable have repaid on

(1) M'Carthy's Land Purchase Cases, 100.

(2) 5 Beav. 6, note.

(3) 33 L. J. (N.S.) Ch. 228.

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foot of their advances sums equal to the guarantee deposit; and also for an order that the accruing interest on the guarantee deposit be paid to the said Edward J. O'Farrell as the person absolutely entitled thereto in his own right.

Meredith, J.

The facts and matters material to the decision of the application are as follows:—By his will dated the 17th January, 1882, Edward R. O'Farrell, the testator, as I shall afterwards call him, devised all his estate and interest in the lands of Tinnehalla and all other property in the county Waterford, together with the rents, issues, and profits thereof to his wife Christina O'Farrell, for her life, and after her death to his sons, Nicholas S. O'Farrell and Edward J. O'Farrell, their heirs, executors, administrators, and assigns, in equal shares as tenants in common. And after certain other specific gifts and some pecuniary legacies the testator gave, devised and bequeathed all the rest, residue and remainder of his property to his son, the present applicant Edward J. O'Farrell, and appointed him sole residuary legatee. The testator died on the 31st March, 1887, without having altered his will, and probate was on the 14th February, 1888, granted to the applicant Edward J. O'Farrell, one of the executors named in the will, power being reserved to make a like grant to Christina O'Farrell, the other executor. At the date of his will the testator was seized of one undivided fourth part of an estate situated in the county Waterford, including amongst others the lands of Tinnehalla specifically named in his will, and the lands of Retagh and Brownswood, which were not specifically named in his will. It is admitted that the terms of the devise of "all my estate and interest in the lands of Tinnehalla and all other property in the county Waterford, together with the rents, issues, and profits thereof" are wide enough to embrace not only the lands of Tinnehalla but also the lands of Retagh and Brownswood and the remainder of the testator's lands situate in the county Waterford.

All these lands were held in fee-simple. Towards the end of 1886 the testator and Mrs. Sherlock—Mrs. Sherlock being the owner of the remaining three undivided fourth parts of the lands—as owners entered into negotiations for the sale of the lands of Tinnehalla, Retagh, and Brownswood, to the occupying tenants of these lands under the provisions of Lord Ashbourne's Act.

Negotiations were carried on with the tenants by Mr. Patrick Joseph Kenny, solicitor, acting under the instructions of Mr. Edward Mansfield, the agent and receiver for the co-owners. Agreements for sale were signed by Mr. Mansfield for and on behalf of the landlords. No question was raised on the argument before me as to the authority of Mr. Mansfield, and the supplementary affidavits filed in support of the applicant's case satisfy me that he was fully authorised to act as he did in the matter. The sales, as I have said, were carried out under the provisions of Lord Ashbourne's Act, and in the view I take as to the rights of the parties it is important to bear in mind the exact nature and character of these provisions so far as they are applicable to the present case. The 2nd section of the Purchase of Land Act, 1885, commonly known as Lord Ashbourne's Act, is as follows:—"For enabling tenants to purchase their holdings, either from the Land Commission or from the landlords of such holdings, the Land Commission may make advances under this Act out of any funds at their disposal.

"With respect to advances under this Act the provisions of Part V. of the Land Law (Ireland) Act, 1881, shall be amended as follows, that is to say:—(*a*). The Land Commission may, if the repayment of the advance is secured by a deposit under this Act (hereinafter referred to as a guarantee deposit), and if the Land Commission are satisfied with the security in other respects, make an advance to a tenant who is purchasing his holding, of the whole principal sum or price payable by the tenant instead of the three-fourths thereof mentioned in Part V. of the Land Law (Ireland) Act, 1881." Then section 3 is, in the view I take of the case, a very important one:—"Any person *willing to secure the repayment of an advance made* by the Land Commission to a tenant who is purchasing his holding either from the Land Commission or from the landlord of such holding *may deposit with* the Land Commission *such sum as a guarantee deposit*, not being less than one-fifth of the advance as may be agreed on between him and the Land Commission.

"*If the person willing to secure the repayment of such advance is a landlord* entitled to be paid by the Land Commission, or out of moneys provided by the Land Commission, any sum for the

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purchase-money of any land sold by him, he may provide such guarantee deposit by permitting the Land Commission to retain the same out of such sum so payable for purchase-money." Part V. of the Act of 1881, which is amended by the 2nd section of the Act of 1885, contains the enactment (sect. 24): "The Land Commission out of moneys in their hands may, if satisfied with the security, advance sums to tenants for the purpose of enabling them to purchase their holdings." Now the rules of procedure for carrying the above provisions into effect, which were in force at the time of the sales, were issued by the Irish Land Commission under the Purchase of Land Act in the month of October, 1885. Rule 2, which is one of the rules under the heading of Acquisition of Lands by Tenants is worded as follows: "Where a landlord and a tenant shall have agreed as to the sale of a holding, application may be made in Form No. 1," that is Form No. 1 in the schedule to those rules of October, 1885. It will be observed from the wording of the form, to which I shall presently refer, that it may be signed either by the landlord in person or by his authorised agent. Applications in the prescribed form, all bearing date the 22nd December, 1886, were lodged in the Court of the Irish Land Commission, signed by the tenants and by Mr. Mansfield; and I am clearly of opinion, having regard to the evidence in the case and to the form and rules, that the signature by Mr. Mansfield, the agent, was sufficient. An attested copy of one of the applications, namely that in the case of Patrick Butler, tenant, has been exhibited in one of the affidavits filed for the purpose of the present application, and it is conceded that the remaining applications were in like form. Patrick Butler's case may, therefore, be taken as a test case. The heading of the document is as follows: "Purchase of Land (Ireland) Act, 1885: Application by Landlord and Tenant for an Advance." "I, Edward Mansfield," the document goes on, "authorised agent of Anne Sherlock and Edward R. O'Farrell, the landlord of the holding described in the schedule below, hereby offer to Patrick Butler, the tenant in occupation thereof, to sell to him the said holding for the sum of £306, inclusive of all expenses incidental to the purchase, which sum is to be paid in the following manner:—By an advance from the Land Commission of £306." The description of the holding

and particulars are set out, and then follows this all-important, as I think, provision: "A guarantee deposit of £62, being not less than one-fifth of the price of the above holding, is to be retained by the Land Commission when making the advance. Dated the 22nd day of December, 1886, signed by the landlord or his agent, Edward Mansfield." And then follows what I may call the tenant's portion of the document, also in the prescribed form. "I, Patrick Butler, judicial tenant in occupation of, and residing on, the holding above described, accept this offer, and agree with the said Anne Sherlock and Edward R. O'Farrell, to purchase from him my said holding for the sum of £306. I request the Land Commission to advance me the sum of £306, to be repaid by an annuity of £4 for each £100, and so in proportion for any less sum for forty-nine years; and I agree that the sale shall be carried out by means of a conveyance, and I undertake to execute to the Commission the necessary deed to secure the repayment of the advance." Now that document read in the light of the 2nd and 3rd sections of the Act of 1885 amounts, in my opinion, to this, it is a joint application made by the landlord and the tenant to the Land Commission for an advance to enable the tenant to purchase his holding. It contains an undertaking, or rather, I should say, portion of the joint application is an undertaking or expression of the willingness of a person, namely the landlord, to secure the repayment of the advance, if made by the Land Commission to a tenant who is purchasing his holding. The mode in which that advance is to be secured is by the retention of a guarantee deposit, and that guarantee deposit the landlord (in pursuance of the second clause of the section) states he is willing shall be provided in this way, namely by permitting the Land Commission to retain the £62 out of the sum that may be payable to him (the landlord) for purchase-money. The landlord offers by that document to become surety for the tenant's advance to the extent of £62, and he states to the Land Commission that he is willing that the sum in respect of which he is to be surety shall be retained out of the purchase-money. In a schedule annexed to the affidavit above referred to, particulars are given as to the names of the tenant purchasers, the amount of the several advances and the dates at which the advances were respectively sanctioned. I may at once state that

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none of the advances were sanctioned in the lifetime of the testator, all save one were sanctioned on the 5th April, 1887. During the argument I inquired whether any order continuing proceedings had been made after the death of the testator; I was informed that so far as the parties were aware, no such order had been made. I have since looked into the matter, and find that no such order was in fact made; and it is to be observed that sect. 10 of the Act of 1885, which incorporates sect. 76 of the Landed Estates Court Act, relating to the abatement of proceedings, has no application to cases where it is agreed, as it was agreed in the present case, that the sale shall be carried out by conveyance from the landlord, as distinguished from vesting order. What happened in the present case after the death of the testator is, I think, clear: the advances were sanctioned in sixteen out of seventeen cases within five days from the death of the testator, most probably in entire ignorance of the death. The advance of £1600, which was sanctioned in the case of Mrs. Bridget Kennedy on the 13th May, 1887, may or may not have been sanctioned under similar circumstances; the records of the Court throw no light on the matter. The devisees under the will of the testator came in and made title, and the sales were, as Mr. Edward J. O'Farrell states in the fifth paragraph of his affidavit, completed in the names of Anne Sherlock, Christina O'Farrell, Nicholas S. O'Farrell, and the applicant, Edward J. O'Farrell. From first to last all orders and rulings were made in the matter of the estate of those four persons, "Vendors of land."

The conveyances to the tenants were executed in the month of August, 1888, and I have before me the conveyance dated the 4th of August, 1888, in the case of Patrick Butler, the tenant already referred to, whose case I have already indicated may be taken as a test case. Now the parties to this conveyance are Anne Sherlock, of the first part, Edward Mansfield, and Edward J. O'Farrell, trustees of the settlement executed on the marriage of Anne Sherlock, of the second part, Christina O'Farrell, Nicholas S. O'Farrell, and Edward J. O'Farrell, of the third part, the said parties of the first and third parts being thereinafter called the vendors; the Land Commission is a party of the fourth part, the tenant Patrick Butler being the party of the fifth part. Mrs.

Sherlock's title, viz. the settlement under which she claimed three undivided fourth parts, is recited, and then follows this recital :— "And whereas Edward R. O'Farrell being seized in fee-simple of the remaining one undivided part or share of the said holding and other lands, by his will dated the 17th January, 1882, devised all his estate and interest therein to his wife, the said Christina O'Farrell for life, and after her death to his two sons, the said Nicholas S. O'Farrell and Edward J. O'Farrell, their heirs, executors, administrators and assigns, as tenants in common. And whereas the said Edward R. O'Farrell died on the 31st of March, 1887, without having altered or revoked his will, and probate was granted to Edward J. O'Farrell, one of the executors. And whereas the purchaser holds the holding hereinafter described, *as tenant to the vendors*, and has agreed to purchase the said holding for the sum of £306, and has applied to the Land Commission to advance him the sum of £306 for that purpose, which the Land Commission has agreed to do under the provisions of the Act of 1885, on the terms of such advance being secured by a guarantee deposit as hereinafter provided, the repayment of the said advance, with interest, being secured pursuant to the provisions of the Act of 1887, by an order endorsed on these presents; And whereas the Commission has at the request of the purchaser paid to the trustees," that is Mrs. Sherlock's trustees, "the sum of £183, being three-fourths of the advance, after deducting a guarantee deposit of £68, hereinafter mentioned, and to the said Christina O'Farrell, Nicholas S. O'Farrell, and Edward J. O'Farrell," that is the three devisees under the will of Edward R. O'Farrell, the testator, "the sum of £61, being the remaining one-fourth part of the said advance, after deducting therefrom the said guarantee deposit, *and has, with the permission and consent of the trustees and of Christina O'Farrell, Nicholas S. O'Farrell, and Edward J. O'Farrell retained the sum of £62 to satisfy the purpose of a guarantee deposit.*" It is witnessed that in consideration of these sums of £183 and £61 so paid, and of the further sum retained as aforesaid (the receipt of which sums are acknowledged by the trustees and by Christina O'Farrell, Nicholas S. O'Farrell, and Edward J. O'Farrell), Anne Sherlock as tenant for life, in exercise of her powers under the Settled Land Act and as beneficial owner, and Christina

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O'Farrell, Nicholas S. O'Farrell, and Edward J. O'Farrell as beneficial owners, according to their respective shares and interests, grant to the purchaser that part of the lands of Brownswood described, to hold to the purchaser in fee-simple, and the vendors release the purchaser from all arrears of rent due by the purchaser to them out of the holding up to the date. Now, as I have said, the parties in all the conveyances were the same, a printed form was adopted, blanks being left for the name of the particular tenant and for the amount of the purchase money and the amount of the guarantee deposit. I must now refer to some orders and rulings of Mr. Commissioner Lynch dealing with the funds which constitute the subject-matter of the present application, and which I am now asked by Mr. Edward J. O'Farrell to declare are his absolute property in his own right. The first of these is the order dated the 30th July, 1888, which is referred to in the affidavit of the applicant filed on the 29th November, 1897. I should mention that it appears that the testator's share of the lands sold was, with other lands, subject to two annuities, one of £35, payable to Catherine O'Ryan during her life, and one of £30, payable to Dorothea O'Ryan during her life, and to enable the lands to be conveyed to the tenants free from these two annuities, the order, the date of which I have mentioned, was made by Mr. Commissioner Lynch. That order is made upon motion of Mr. P. J. Kenny, solicitor for the said owners, that is the four owners, grounded upon the affidavit of P. J. Kenny, filed 28th July, 1888, and on certain documents. This is the order:—"Let the lands of Brownswood, Tinnehalla and Retagh, being sold herein, be indemnified against the annuities of Dorothea O'Ryan and Catherine O'Ryan, created by the deed of 1878, by one undivided one-fourth part of the following lands, that is to say, the lands of Portnaboe," and the other lands which are set out, and which were lands in the county of Waterford, held by the testator in fee-simple, other than the lands the subject-matter of the agreement for sale to the tenants—in other words, the unsold estate, as distinguished from the sold estate. But in addition to that indemnity the Commissioner proceeded further:—"And let the sum of £1500 be retained out of the proceeds of the said sales and be placed to the credit of this matter, and the separate credit of the

said owners, save Anne Sherlock, as a further indemnity against the said annuities." That is to say, the £1500 that I am now asked to pay out to Mr. Edward J. O'Farrell in his own right, was by an order dated 30th July, 1888, made upon the application of a solicitor who was acting for him as well as for his mother and his brother, directed to be retained out of the proceeds of the sale, and placed to the separate credit of the three, and not to the separate credit of Mr. Edward J. O'Farrell as, if his case is correct, it ought to have been. That sum was retained pursuant to the order, and portion of it—I do not think the whole of it—was invested in the purchase of £1131 Dublin, Wicklow, and Wexford Stock, referred to in the motion, and was transferred to the credit and the separate credit directed by the order of Mr. Commissioner Lynch, and it is still standing to that credit and separate credit. So far as I know there is no ruling dealing with the dividends upon that sum of stock, except one, dated 11th April, 1890. Of course it is absolutely necessary before I pay out this money to anybody that I should see what orders have been made by the Court and by the Commissioner in charge prior to the present day. The ruling, which is dated 11th April, 1890, is made upon the application of P. J. Kenny, solicitor for Edward J. O'Farrell, Christina O'Farrell, and Nicholas S. O'Farrell. It refers on the face of it to the order of the 30th July, 1888, to which I have already referred, and it then proceeds:—"Let the dividends now due or to accrue due on £1131, Wicklow and Wexford Debenture Stock standing to the credit of this matter and separate credit of applicants be paid from time to time, and until further order to applicants in equal shares on the production by them of receipts up to the latest gale day for payment of annuities referred to in said ruling." That no doubt must have been made on the application of the three, and on some consent in any aspect of the case, because Christina O'Farrell was tenant for life under the will of her husband, and her sons entitled in remainder. Now the circumstances under which the present application to pay out that capital fund of £1131 stock is made are these:—Both the annuitants are dead, the indemnity fund has thus been set free, and the present applicant asks for a declaration that he is absolutely entitled to it as

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a residuary legatee under his father's will. Nicholas S. O'Farrell, one of the sons of the testator, died intestate on the 14th of November, 1891; he left a widow and six children surviving. The children are represented on the present application by their guardian, and the argument on their behalf was presented to the Court by the learned Serjeant Campion and Mr. Wakely. Christina O'Farrell, the mother, died intestate on 16th February, 1894. As I have said, the application is conversant not merely with the Dublin, Wicklow, and Wexford Stock, but also with the guarantee deposits; they could not be paid out immediately, because the tenant purchasers have not yet repaid a sufficient sum to the Land Commission. But Mr. Price, on behalf of his client, asked for a declaration, that when the tenant purchasers have repaid a sufficient sum the guarantee deposits will be the property of Edward J. O'Farrell in his own right, and not in any other capacity, and that the dividends in the meantime should be paid to him from time to time. Now the guarantee deposits in respect of all the sales amount to £2746; the testator's share was one-fourth, amounting to £686 10*s.*; and it appears from an extract from the register of guarantee deposits, exhibited in the affidavit of Mr. O'Farrell, that the sum is now standing in the register in the names of Christina O'Farrell, Edward J. O'Farrell, as limited administrator of the personal estate of Nicholas S. O'Farrell, and the said Edward J. O'Farrell himself in his own right. It further appears by the register itself that this sum was originally registered in the names of Christina O'Farrell, Nicholas S. O'Farrell, and Edward J. O'Farrell, and the interest directed to be paid to them; that appears upon the face of the register and the certificate, though I have not been able to trace any definite order or ruling directing that to be done. The alteration effected by substituting the name of Edward J. O'Farrell, as limited administrator of his brother Nicholas for the name of Nicholas himself, was effected by a ruling which was made upon the 11th January, 1893. This also is a ruling by Mr. Commissioner Lynch, in the same title and same matter. "Application of Messrs. Nunn and Delandre, solicitors for the said Edward J. O'Farrell. Readings, letters of administration of the personal estate of Nicholas S. O'Farrell. Ruling: Let the

register of guarantee deposits herein be amended by striking out the name of Nicholas S. O'Farrell and substituting therefor the name of the applicant, as limited administrator of the personal estate of the said Nicholas S. O'Farrell, deceased, and let the interest now due, and to accrue due on the one-fourth part referred to in the said certificate be paid to the applicant and Christina O'Farrell until further order." No appeal was taken from that ruling, nor could any appeal have been taken, because it was made on the application of Mr. Edward J. O'Farrell himself.

It is, however, only proper to say that the money being in Court a capital fund, I do not place too much weight upon these interlocutory orders. The real rights of the parties must be determined before the money is paid out. But I cannot help pointing out that it is a little inconsistent with the case now made by Mr. Edward J. O'Farrell, that he was and is absolutely entitled to the money, and that his brother had no rights in respect of it, and his brother's children have no rights in respect of it, to find him on the 11th January, 1893, asking that his name should be put on the register as limited administrator of his brother, and that the dividends should be paid to him, partly in that capacity and partly in his personal capacity. It may be that he has only recently become aware of his rights, or supposed rights, and if so, of course his action would be explained. He does not in any of his affidavits make this case, but the explanation is a possible one. He sums up his present demand and the reason for it in the 11th paragraph of his first affidavit:—The lands of Tinnehalla, Retagh, and Brownstown, were (he alleges) converted by the testator into personal estate by reason of the contracts for sale entered into in December, 1886, and the applicant as residuary legatee under testator's will is entitled in his own right to the funds in Court representing portion of the proceeds of sale. I pause here to observe that after perusing the documents to which I have called attention, it seems to me difficult to arrive at any conclusion other than this, that the Land Commission with the full consent and concurrence of the applicant Edward J. O'Farrell carried out the sales, and dealt with the proceeds of sales for ten years and upwards, on the basis that the devisees under the testator's will were entitled to the beneficial as well as

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to the legal interest in the testator's one-fourth part of the lands comprised in the agreements for sale, that is to say, upon the basis that no question of conversion arose between the real and personal representatives of the testator. How else is it possible to account for the order of 30th July, 1888, made upon the application of Mr. Kenny, solicitor for the owners, how for the form of conveyance, how for the registration of testator's one-fourth part of the guarantee deposit in the first instance, in the name of Christina, Nicholas, and Edward, how for the payment of the interest in respect of that one-fourth to Christina, Nicholas, and Edward J. O'Farrell, and how for the subsequent ruling made upon the application of Edward J. O'Farrell himself, after the death of his brother, amending the registration of the guarantee deposit, by inserting the name of Edward J. O'Farrell, as limited administrator of Nicholas in lieu of the name of Nicholas S. O'Farrell, as one of the three persons entitled to one-fourth of the guarantee deposit? Some of these circumstances may be explained away by the suggestion that the Land Commission were wise in their generation, and insisted upon having as parties to the conveyances to the tenants—the devisees under the will of the testator as well as the residuary legatee under the will. But the order of the 30th July, 1888, and the alteration made in the registry of guarantee deposits, at the express instance of the present applicant, Edward J. O'Farrell, can only be accounted for upon the supposition that he was then ignorant of what he now professes to be most assured, namely his rights, as residuary legatee, to the entire proceeds of the sale of the lands sold to the tenants. There is only one other document to which it may be necessary to refer. It is an indenture dated 24th January, 1887. It purports to be made between Anne Sherlock, of the first part, Edward R. O'Farrell, the testator of the second part, the Roman Catholic Bishop of Waterford and Lismore, and the Very Rev. Richard Fitzgerald, Roman Catholic clergyman, of the third part, some ladies who appear to be nuns of the Presentation Convent of Dungarvan, of the fourth part, Edward Kelly of the fifth part, and Rev. Nicholas Phelan, Roman Catholic clergyman, of the sixth part. All these parties, except the parties of the first and second part were mortgagees. The document was drawn with the intention of facilitating the

sales to the tenants which were afterwards carried out, and getting rid of the difficulty arising from the fact of the mortgages affecting the vendors' interest. There is a memorandum at the foot of that deed which is relied upon, curiously enough by both sides, by Mr. Price, as strongly in favour of his view of the case, and equally strongly by Serjeant Campion, as demonstrating the truth and justice of his case. Now I doubt very much whether a document which is capable of being considered from these two different points of view can assist the Court very much in coming to a conclusion. I think, myself, it is a neutral document, and I think it is capable either of being read in favour of Mr. Price, or of being read in favour of Serjeant Campion. The memorandum states that since the date of the deed and before executing it Edward R. O'Farrell had died; it refers to his will, states that he devised the within mentioned lands and premises—that is, the sold lands—to his wife Christina O'Farrell for life, and after her death to his two sons Nicholas and Edward Joseph, and that he appointed his wife and Edward Joseph executrix and executor of his will.

The memorandum then proceeds:—"Now, we, the said Christina O'Farrell, Nicholas Sweetman O'Farrell, and Edward Joseph O'Farrell, do hereby assent to and confirm the within indenture in all respects, to the intent that it may be as effectual and as binding as if same had been executed by the said Edward R. O'Farrell previous to his death, and we agree to do all necessary acts to carry its terms into execution." It is obvious that is capable in one point of view of amounting to the adoption, confirmation, and ratification of what the testator did or might have done under the agreement. The other point of view is that it expressly calls attention to the fact that these lands which were the subject matter of the sales before the Court, were devised by the will to Christina O'Farrell for life, and after her death to her two sons, and that it was in their capacity as devisees under the will, and persons legally and beneficially entitled to the lands, that the document was executed.

Now, these being the facts, which, having regard to the amount involved (over £2200), having regard to the importance of the question raised, having regard to the arguments to which I listened with the respect and attention due to the eminence of the

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counsel on both sides, I have felt it my duty to state as fully and as clearly as I could, I proceed to consider the questions of law applicable to those facts. I have arrived at a conclusion which is satisfactory to my own mind, but it by no means follows that my conclusion will commend itself to the mind of other Judges who may possibly have to deal with this case. Mr. Price indeed contends that the law is clear, and that his client is entitled on settled principles, and having regard to well-known authorities, to have the money paid out to him in his own right. There are not many cases with which it will be necessary to occupy public time. The case of *In re Walsh* (1) is relied upon by Mr. Price as a strong authority in his favour. He admits that there is one distinguishing circumstance. The facts of the case were somewhat similar to the facts of the present case. The difference between the cases is that the agreement for sale in *In re Walsh* (1) was sanctioned by the Land Commission in the lifetime of the vendor; whereas in the present case the agreements were not, nor was any one of them, sanctioned in the lifetime of the testator. Mr. Justice Bewley, in giving judgment in *In re Walsh* (1), said: "By this will, which was made long prior to the proceedings taken by the testator under the Land Purchase Acts, the testator had devised his fee-simple property at Jossestown to his wife for life, with remainder to his brother Thomas or his children; but as there was a binding contract for sale of the lands in question at the date of the testator's death capable of being specifically enforced, the interest of the testator in the property as between his real and personal representatives would, when the advance was made by the Land Commission, form part of his personal estate," and the learned Judge refers to *Attorney-General* v. *Day* (2), and *Weeding* v. *Weeding* (3). In my opinion, there is a clear distinction between *In re Walsh* (1) and the present case; and I apprehend that Mr. Justice Bewley had before his mind that the advance in Walsh's case had been sanctioned in the testator's lifetime, when he said that there was a binding contract for the sale of the lands in question at the date of the testator's death capable of being specifically enforced, and when he held that there had been a conversion of the estate in the tes-

(1) MacCarthy's Land Purchase Cases 100. (2) 1 Ves. Sen. 218.
(3) 1 J. & H. 424.

tator's lifetime. *In re Bateson's Estate* (1) was also a decision of Bewley, J. In that case the learned Judge traces the origin and development of the powers now vested in the Land Commission of making advances to tenant purchasers, and his observations seem to me of great importance in the present case. Having dealt with what I may call the historical aspect of those powers, he says, at p. 565: "It will be seen from these provisions that the inception of the jurisdiction of the Land Commission in matters relating to the purchase by tenants of their holdings was the transfer to the Commission of the powers theretofore exercisable by the Board of Works, and although these powers were enlarged, the nature of such purchase transactions was not materially changed . . . The sale was carried out, not by any judicial order of the Commission, but by the voluntary contract of the parties." Mr. Justice Bewley deals further on with the question which arose as to the date at which conversion takes place in the case of sales carried out by conveyance through the Land Commission. At p. 569 he says: "In cases carried out by conveyance the conversion of the land into money is effected by the act of the parties, and not by any order of the Court. The form of the agreement for purchase is that 'in case the Land Commission shall advance the sum of £ . . . to the tenant for the purchase of his holding, the landlord will sell, and the tenant will purchase the same.'" (That form is slightly different from the form in force in 1886: but in the view I take of the true construction of the "application" I do not think there is any substantial difference). "So that no conversion actually takes place until the advance is made. But even if the order sanctioning an advance could by any means be construed as working a conversion of the land into money, I fail to see how it could be held to amount to a direction that the money should be applied in discharge of incumbrances." I am not quite certain whether Mr. Justice Bewley had before his mind at that particular moment his decision in *In re Walsh* (2); but at all events, reading the two decisions together, I entertain no doubt that Mr. Justice Bewley's judgment in *Walsh's Case* proceeded on the basis that an order sanctioning the advance had been made in the lifetime of

(1) [1895] 2 I. R. 559. (2) MacCarthy's Land Purchase Cases 100.

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the two applicants, that is, of the landlord and tenant. However, Mr. Price says that the fact that the contract was not complete, that the order sanctioning the advance was not made in the lifetime of the landlord, is immaterial. His argument is as follows: This was a conditional contract, a contract which became complete, the condition being fulfilled, the moment the advance was sanctioned by the Land Commission. When that advance was sanctioned, the order or the sanction related back to the original contract, and conversion took place by virtue of the original contract. I did not understand Mr. Price to argue that the original contract itself operated to convert the property, but that, as between the real and personal representatives of the testator, when the condition was fulfilled, the sanction related back and effected a conversion by virtue of the testator's contract. The result of course would be that as from the date of the sanction (five days after the death) conversion would take place, though the devisees might be entitled to the rents up to the date of the sanction. In support of this branch of his argument, Mr. Price relies mainly upon the cases of *Lawes* v. *Bennett* (1), and *Weeding* v. *Weeding* (2). *Weeding* v. *Weeding* (2) is a decision of Lord Hatherley, then Vice-Chancellor Page Wood, and the marginal note is as follows: "Where, after making a will devising a specific estate and bequeathing the personal residue to other persons, a testator entered into a contract giving an option of purchase over part of the estate, which option was exercised after the death:—*Held*, that the property was converted from the date of the exercise of the option, and went to the residuary legatees." Up to the decision of that case perhaps *Lawes* v. *Bennett* (1) would not have been absolutely followed. Since *Weeding* v. *Weeding* (2), *Lawes* v. *Bennett* (1) is a clear authority, and the Vice-Chancellor in his judgment pointed out that the principle of *Lawes* v. *Bennett* (1) ought not to be frittered away by subtle distinctions. I need not go into the reasons which he gives for his decision. But at p. 430 there is an observation which is much in favour of Mr. Price's view, and which has greatly pressed upon my mind: "I cannot agree with the argument that there is no contract. It is as much a

(1) 1 Cox, Ch. Cas. 167.

(2) 1 J. & H. 424.

conditional contract as if it depended on any other contingency than the exercise of an option by a third person, such as, for example, the failure of issue of a particular person." That *Weeding* v. *Weeding* (1) is still law, and ought to be followed in cases where the facts admit, is quite clear. So lately as 1894, Mr. Justice Chitty, in *Isaacs* v. *Reginall* (2), applied the principle of *Lawes* v. *Bennett* (3) to a case of intestacy, even though the option to purchase was exercisable only after the death of the grantor. This, no doubt, was also a case of option of purchase. Mr. Justice Chitty, now Lord Justice Chitty, says at p. 510:—"I cannot see that I should be extending *Lawes* v. *Bennett* (3) if I say that that decision applies to a case where the option arises only after the death. It seems to me to be an immaterial circumstance, and I should be, under the pretence of distinguishing *Lawes* v. *Bennett* (3), declining to follow it, if I adopted this argument. In *Lawes* v. *Bennett* (3) the option was exercisable as well before as after the death. It was, in fact, exercised after the death. I can see no substantial ground for saying that the circumstance that the option was so limited, as to be only exercisable after the death, creates a material distinction. If I had adopted, which I do not, the principle . . . that the decision of *Lawes* v. *Bennett* (3), and the subsequent cases involved this proposition, that the conversion related back to the contract, then I might have thought there was something in the distinction; but, in my opinion, that is not the result of the authorities . . . the option does not operate completely to convert the property until it is exercised, because the rents in the interval after the testator's death go to the heir-at-law." The principle of these cases of *Lawes* v. *Bennett* (3) and *Weeding* v. *Weeding* (1), (Mr. Price argues), is summed up conveniently in Dart V. and P. (6th ed.), p. 295:—"In all cases, the question between the real and personal representatives seems to be this, viz. whether the vendor at the time of his death was, either absolutely or contingently, under such an agreement as Equity would enforce against him: if so, the property (as between his real and personal representatives), forms part of his personal estate from the time fixed for completion; whether such time be specified in the contract, or have to be deter-

(1) 1 J. & H. 424. (2) [1894] 3 Ch. 506. (3) 1 Cox, Ch. Cas. 167.

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mined by the occurrence of some collateral event, or depend upon the mere option of the purchaser." In my opinion I would have no option save to apply the principle so laid down to the present case if there was a binding contract for sale at the date of the testator's death capable of being specifically enforced, as Mr. Justice Bewley held there was in *In re Walsh* (1); but in my opinion there was no such contract. I take the document which is called the agreement for sale; I have already referred to its form and to its provisions, and I regard the substance and not the form of that agreement, and I decline to take one portion of the document by itself, and to say: "Here is an offer by the landlord to sell, and here is an agreement by the tenant to purchase at a sum of £306, which is to be payable by an advance from the Land Commission." Having regard to the provisions of the Act of 1881, to the prescribed form, and the document itself, I hold that this was in truth and in fact a joint application by the landlord and the tenant for an advance to enable them *to enter into a contract* for sale, and I regard the provisions to which I have called attention in reference to the guarantee deposit as of the utmost importance in the case. I look upon the application to the Land Commission, not as an application to a Court, but as an application to the Land Commission endowed with, and exercising, the powers formerly exercised by the Board of Works. I look upon the landlord as offering by that document to become surety for the tenant to the extent of £62, and I take the case in which a landlord and tenant agree apart altogether from the Land Commission, the one to sell and the other to purchase a holding, the purchase-money to be provided by a loan to be borrowed from a third person, partly on the security of the holding, and partly on the personal security of the landlord himself. I ask if such an agreement as that were entered into outside the Land Commission, and if before the proposed lender had made any answer to the application for a loan the landlord or tenant had died, would it be reasonable to say that there was a binding contract for sale in existence, and that the lender would have power to proceed with the loan, and accept as surety a dead man. I regard the case in that aspect. In one

(1) MacCarthy's Land Purchase Cases 100.

sense I think it was a conditional contract, but I think the condition was that the advance was to be made upon the joint application of a living landlord and a living tenant, and that the Land Commission had no jurisdiction or power to accept as part security for the advance the offer of a dead man to supply the required guarantee deposit. I think that what was done in the present case was done in ignorance of the fact that the death had occurred. But, whether it was or not, it seems to me to be clear that when the testator died the conditional contract died with him, and the condition which alone could have given force and validity and vitality to the contract as far as he was concerned, became impossible of fulfilment. I cannot see how that offer of his, which was an essential portion and element in the agreement—the offer to provide the guarantee deposit in respect of the advance, by allowing money of his (the landlord's) to be retained by the Land Commission if an advance was made—I do not see how that offer could be discussed or could be accepted, or could be dealt with by the Land Commission when the landlord, the proposed surety, was lying in his grave. That is really the distinction I draw between the present case and all the cases that have been referred to by Mr. Price. In all those cases by the very terms of the contract it was open to the purchaser, to the lessee, after the death of the testator to call for the carrying out of the contract. As I read the document—a joint "Application by landlord and tenant for an advance," the tenant had no power when the landlord died to have the proceedings continued as against his representatives, and the Land Commission had no jurisdiction to accept his offer, or to make an order on the joint application. There was no power to continue the proceedings. And I think it is not unimportant to observe that the 22nd section of the Act of 1887, which was undoubtedly passed with a view of enabling the Land Commission to prevent proceedings lapsing by the death of the vendor, provides that "When either before or after the passing of this Act a sale of a holding has been agreed to be made by a landlord to a tenant, and an application for an advance to enable the tenant to buy the holding has been sanctioned by the Land Commission, either party to the agreement for sale may apply in a summary manner to the Land Commission to decree the specific performance of the

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agreement." I do not say that necessarily involves that another Court might not have jurisdiction to deal with the matter before the advance was sanctioned, but as far as the Land Commission is concerned there is a clear indication in that section that until the advance has been sanctioned upon the application of landlord and tenant, the Land Commission at all events have no power to direct specific performance.

Now, another argument that was addressed to me was grounded upon the case of *Frayne* v. *Taylor* (1), and I desire to say one word with reference to that case. It is a decision of Vice-Chancellor Kindersley. There was a question of conversion there. The Vice-Chancellor says:—"It is true the testator or the purchaser might have said 'the Statute of Frauds prevents you from compelling me to perform,' but the statute does not make the agreement void. The statute says, no suit shall lie to compel him to carry into effect a verbal agreement. It appears to me that what the defendant has done is with design and not by mistake, but knowing what he was about; and he chose to say, 'I will carry out the contract of the testator,' and he did so." Now, observe there was a valid contract, the Statute of Frauds did not make that valid contract an invalid contract, it was a complete and perfect contract; but if either party had chosen to set up the Statute of Frauds, it could not have been specifically enforced. That was the position of affairs. Well, the heir-at-law says:—"I won't raise the point, my ancestor entered into a contract, it would have been binding on him in honour, he might have resisted it by raising the defence of the Statute of Frauds; but I won't raise the Statute of Frauds, I will carry out the contract." The Vice-Chancellor held that he did all this with his eyes open, and knowing what he was doing, and intending to carry out the contract made by his ancestor. There is a case of *Parry* v. *Spencer* (2). I am not quite sure whether it was referred to on the hearing. It was a decision of Mr. Justice North, also a case of parol agreement. A testator agreed, verbally, to sell land, and received a deposit; the residuary devisee contracted, in writing, to sell the lands to the same purchaser at the same price, to be paid partly by deposit: it was held

(1) 33 L. J. (N. S.) Ch. 228. (2) 34 Ch. D. 214.

that the devisee had not adopted his testator's parol contract so as to effect a conversion relating back to the testator's life-time. Mr. Justice North says:—"I think the case is a clear one. I see no evidence in the contract that there has been an adoption of a previous contract. It seems to me expressed exactly in the way in which it would have been, if it was intended to be a new contract, when no contract had been entered into before . . . I think it was clearly a new contract, and there was a conversion only after the death of the testator. It was not contended that there was any binding contract which could have been specifically enforced against the testator in his lifetime."

Now, in the cases before the Court I am of opinion that what really happened was, not that the specific devisees adopted the contract of the testator with the object of carrying out that contract, and that contract alone. I have purposely referred to the terms of the conveyance to Patrick Butler, I have purposely dwelt upon the several orders and rulings that were made in the case, and I draw the inference from those documents that the parties did not intend to set up the contract of the testator in such a way as to effect a conversion of the property as between the real and personal representatives relating back to the testator's lifetime. The documents—the conveyance itself—treat the matter as an agreement between the four vendors and the tenant. The conveyance itself treats the retention of the guarantee deposits as an arrangement made between the four vendors and the Land Commission. The conveyance itself recites the will of Edward J. O'Farrell the testator, and the devise in the will of the lands mentioned in the conveyance; and it states that these lands are held at that time—the date of the conveyance—by the purchaser as tenant to the vendors. Well, I do not want to repeat all that I have already said with reference to the orders and rulings; it is demonstration to my mind that a thought of conversion, as between the real and personal representatives of the testator, never entered into the mind of Mr. Edward J. O'Farrell until the year 1897. All the documents are inconsistent with any such idea. It seems to me that what happened is what one would expect would naturally happen. It having been found that the Land Commission were willing to advance the money to the purchaser, the

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devisees under the will came in, and said:—"We will carry out the conveyance to the tenant, we will enter into a contract with him, we will carry out the contract, and we will give him the identical terms which our testator was willing to give." It may be that there was no express statement to that effect; but when I consider that that was the only, as it seems to me, legal, and it certainly was the only equitable way of carrying out what has been done in the sales to the tenants, when I have the documents, when I have the applications made by Mr. Edward J. O'Farrell himself, when I have all the circumstances in favour of taking the view that this was a contract with, and conveyance from, the devisees as the legal and beneficial owners, I think the legal view I take of the case is that which is really consonant with the truth and justice of the case, and I accordingly hold that so far from these orders and rulings made by the Land Commission dealing with these funds being wrong, they were right, and that this sum of £1131 debenture stock is not the absolute property of Mr. Edward J. O'Farrell in his own right; but that as to one moiety of it he can only receive it in his capacity of personal representative of Nicholas S. O'Farrell. Of course, if desired I shall pay out to Mr. Edward J. O'Farrell the entire of the sum, unless any application is made by the minors to retain one-half in Court; but I see no reason to suppose that there is any necessity for taking any such course, or any reason why the entire fund should not be paid, with a declaration that Mr. Edward J. O'Farrell holds one moiety of it as personal representative of his brother. As regards the guarantee deposit, I think the order I should make is, to amend the register of guarantee deposits by striking out the name of Christina O'Farrell, who is now deceased; that would be sufficient, because it will stand then in the name of Edward J. O'Farrell as personal representative of Nicholas, and in his own name in his own right. I will make an order that the dividends on the guarantee deposit be paid to him, one moiety in his own right, and one moiety as personal representative. I will direct the costs of both sides to be paid out of the fund.

D. M'C. M.

Edward Joseph O'Farrell appealed to the Court of Appeal (FitzGibbon, Walker and Holmes, L.JJ.).

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In re Sherlock's Estate.

Jan. 13, 19.

Price, Q.C., and *Brunskill*, for the appellant.

Serjeant Campion, Q.C., and *Wakely*, for the respondents.

Fitz Gibbon, L.J.:—

This is an appeal from an order dated 12th November, 1898, of Meredith, J., upon a reference by Mr. Commissioner Lynch, in the exercise of the jurisdiction conferred by the Land Purchase Acts.

The order refused the application of Edward Joseph O'Farrell that one-fourth of the guarantee deposits in this matter, amounting to £686 10*s.*, should be registered in his name alone, and that the interest thereon should be paid to him as being absolutely entitled thereto for his own use, and that he should also be declared entitled to £1131 Dublin & Wicklow Railway 4½ per cent. Debenture Stock, standing to the credit of the matter—the title to which is, in the events that have happened, the same as that to the guarantee deposits—and that the same should be transferred to him.

The guarantee deposits represent one-fifth of the purchase-money of holdings purchased by the tenants, and the debenture stock represents a sum of £1500, further portion of the same purchase-money invested and retained as part security against two life annuities charged on the lands sold, and as the annuitants are now dead the fund has become payable to the vendors. The funds in Court do not represent the entire purchase-money. The question affected the title to one-fourth of the estate sold; but we have to deal only with so much of the purchase-money of that one-fourth as is still in Court, and four-fifths of that purchase-money, less by the indemnity fund, were paid away at the time of the sale to persons, one of whom was the appellant himself, who have hitherto always been treated as the owners of one-fourth of the land sold in the matter, and the principal and income of the funds in Court, frequently on the application of the appellant himself, have been hitherto dealt with on the same basis.

The title is as follows:—Edward Richard O'Farrell, the appellant's father, was the absolute owner of one undivided fourth

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of the lands, and, so far as appears, this was the principal part of his property.

By his will, dated January 17, 1882, he devised all his estate and interest in the lands of Tinnehalla and all other property in Waterford, including the lands now in question, to his wife Christina for life, and after her death to the appellant and his brother, Nicholas Sweetman O'Farrell, in equal shares as tenants in common. He gave some legacies which he charged upon the lands, and finally he devised and bequeathed all the rest, residue, and remainder of his property to the appellant, whom he appointed his residuary legatee, and also joint executor with Christina O'Farrell. The will was proved by the appellant alone on February 14, 1888, and the evidence demonstrates that from that day until this application was made, in the contemplation of every person who dealt with the property, and of the Land Commission, the devise of the lands to Christina for life, with remainder to her two sons in equal shares, has been operative.

For eleven years the appellant has treated the lands as having passed under the specific devise, subject to his mother's life-interest, to himself and his brother, Nicholas Sweetman O'Farrell, as tenants in common. He first became his father's personal representative, and afterwards, on Nicholas S. O'Farrell's death, he clothed himself with a fiduciary relation towards his dead brother's widow and children, by taking out limited administration; and now he seeks to treat the property as having been converted in the testator's lifetime, and as having passed to himself as personalty under the residuary clause, and, therefore, as having always been absolutely his own ever since his father died. If equity compels us to adopt this view, it appears to me, under the circumstances of this case, that equity will work iniquity.

But are we compelled to adopt this view? The negotiations for the sale to the tenants were commenced in 1886, between Anne Sherlock and Edward Richard O'Farrell on the one hand, and the Rev. Thomas Hearne, a Roman Catholic clergyman, who represented the tenants, on the other.

Edward Richard O'Farrell was then in his last illness, and the appellant, the eldest son at home, in his own words, was his

father's "right hand man in all his affairs." The negotiations with the tenants were carried on by the appellant and Mr. Kenny, who was the solicitor for Mrs. Sherlock as well as for Edward Richard O'Farrell. These negotiations resulted in Edward Richard O'Farrell's verbally assenting to terms offered on behalf of the tenants; and this assent was verbally communicated through the appellant to Mr. Kenny, who thereupon proceeded to take the necessary steps for carrying out the sales. For this purpose documents were prepared, the terms and nature of which appear to me to be important, as evidence of what the contract with the tenants really was. Besides the applications to the Land Commission, a draft agreement was prepared, bearing date January 24, 1887, purporting to be made between Anne Sherlock of the first part, Edward Richard O'Farrell of the second part, and certain mortgagees of Mrs. Sherlock's share of the property of the third part. This document was not executed by all the parties at the time it bears date. It was never executed by Edward Richard O'Farrell, who died on March 31, 1887; it was never sent to him for execution; it was delayed in obtaining the execution by one of the other parties; and so far as Edward Richard O'Farrell was concerned, at the date of his death it was a draft agreement, and nothing more. It might not, *per se*, be evidence against the tenants, if any controversy arose with them, but it is evidence, as against the parties to it, of the terms of the contract for sale of the lands by them. It recites that Anne Sherlock was entitled to three-fourths of the land, and Edward Richard O'Farrell to the remaining one-fourth: it recites mortgages affecting Anne Sherlock's share, and then it proceeds: "Whereas considerable difficulties having of late years been experienced in collecting the rents payable by the tenants upon the said lands . . . and the interest due on the said mortgages having fallen into arrear, and the said mortgagees being apprehensive that the said principal sums would be wholly lost if immediate steps were not taken to realise a fund out of which the same might be paid, so far as the said fund, after the deductions hereinafter mentioned, would extend; and to put an end to the dispute at present existing between the tenants on the said townland and the beneficial owners thereof, the said Anne Sherlock and Edward Richard O'Farrell, they the said

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Anne Sherlock and Edward Richard O'Farrell, and the said mortgagees, have entered into the agreement hereinafter contained."

Then comes the operative part of the deed by which Anne Sherlock and Edward Richard O'Farrell and the mortgagees mutually agree that "the said Anne Sherlock and Edward Richard O'Farrell *shall sell* to the tenants"—treating the sale as a future thing, and the agreement to sell as being *thereby* made.

Then follow several provisions as to the terms of sale, and the disposal of the purchase-money, including the following:—"Each of the tenants is to pass his promissory note" [payable, as to some of the tenants, on April 1, and as to others, on October 1 then next] "for a sum equal in amount to one-half year's interest at £4 per cent. on the proposed purchase-money of his holding. The aforesaid notes are to be made payable to P. J. Kenny, solicitor, who, on receiving the amount of same, shall pay thereout one-quarter of the sum received thereunder to the said Edward Richard O'Farrell, and shall pay the remaining three-quarters thereof" to the mortgagees as therein mentioned.

Thus it appears that the contract for purchase by the tenants included a term by which they were to be discharged from arrears of rent, and were to pay only one half-year's interest on their purchase-money, from a date fixed by agreement. The tenants were not parties to this document, but it may be assumed that it truly states, as between the owners, what the tenants' agreement as to arrears and interest really was, and this term of the contract for sale and purchase was material, and involved a considerable amount of money, and is not mentioned in the documents which are now alleged to have converted the lands into personalty.

When Edward Joseph O'Farrell had got his father's consent to accept the tenants' terms, Mr. Mansfield, the agent of the landlords, was verbally instructed to put the matter in train for obtaining the advance of the purchase-money from the Land Commission. Under the rules of the Land Commission then in force the necessary documents had to take the form of offers, signed by the landlords or their authorized agent, to sell at certain prices, with acceptances by the tenants, subject to advances of the purchase-money being made by the Land Commission. These documents were accordingly signed by Mr. Mansfield and by the tenants, and were lodged with the Land

Commission. Thus there was, in each case, a conditional proposal and a conditional acceptance, the fulfilment of the condition being dependent on the action of a third party, viz. the Land Commission. It has been argued for the respondents that such an agreement could not, in any case, amount to an enforceable contract, until fulfilment of the condition. I think that in this case there was no complete and enforceable contract of sale, evidenced in writing, at Edward Richard O'Farrell's death, but I do not think it necessary to say that this would necessarily be so in every case, and I desire to put my opinion upon special grounds. To constitute an enforceable contract for the sale of lands, a document sufficient to satisfy the Statute of Frauds must be forthcoming to evidence all the material terms of the agreement. In this case, it is not proved when or how the tenants bound themselves as to the arrears and interest, but it appears that the whole contract is not to be found in the accepted proposals which were signed by Mr. Mansfield and the tenants, and lodged with the Land Commission; for they are silent upon this material point. Furthermore, the terms, extent, and nature of Mr. Mansfield's authority are not proved, and it is not suggested that he had any authority in writing to sell the lands, or to do more than sign and lodge the prescribed forms, and apply for the sanction of the Land Commission for the advance. The accepted proposals, when lodged, were not treated by the parties as being complete or effective contracts of sale, or as containing all the terms of the actual agreement. The execution and terms of the draft agreement, bearing date January 24, 1887, seem to me to be, at the least, evidence that the documents lodged with the Land Commission were nothing more than ministerial steps towards obtaining advances of public money to complete sales otherwise agreed upon, and to be otherwise carried out. The sales were to be carried out by conveyance, and I think that the negotiations were regarded by all parties as *in fieri*, up to the completion of the agreement between the vendors, and the execution of the conveyances to the tenants. But it is enough to say that it was still open to the parties to regard the matter as incomplete, and to enter into a new agreement upon the basis that it was incomplete, at the death of Edward R. O'Farrell, and it seems to me to be perfectly clear that they did so.

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Matters had proceeded no further than the preparation of the draft agreement among the vendors, and the lodging of the proposals accepted by the tenants with the Land Commission, when Edward Richard O'Farrell died on March 31, 1887. The advances were not sanctioned during his lifetime, and, in my opinion, there was, at the time of his death, no complete conrtact, evidenced in writing, or enforceable against him or his representatives. On his death, if the Land Commission had become aware of it, nothing more would have been done, nor would the conditions annexed to the sales have been fulfilled, until the representatives were duly brought before the Court. If they had suggested that the effect of sanctioning the advances would be to deprive Christina O'Farrell and her son Nicholas of the provision whichthe vendor's will had made for them, I am certain that the Land Commission would have proceeded no further, and would have required the new owners to enter into a new agreement, or would have allowed the sales to drop. By inadvertence, and in blank ignorance of the death, and only five days after it occurred, the Land Commission made orders sanctioning the advances in the case of all the tenants save one, and this one was sanctioned some time after. I hold that these orders were harmless, and they were irregular. If the question of conversion had been raised, it was at least arguable that no conversion had taken place; or that, if it had, the sales ought not to be carried out. But at all events, it was open to the new owners to take up the proceedings, and to carry out the sales, on the basis of the will, and on the assumption that the devisees were now the owners. They did this, and having done so I hold that one of those owners cannot, after eleven years, and after a long course of dealings importing consideration, now reverse all that has been done, and claim the property as exclusively his own.

Meredith, J., refers to a number of orders and rulings, most of them made on the application of the appellant himself. I have read these, and they are, in my opinion, material. They will be entered on our order. In all these proceedings the appellant is named, and acted, as *one of the vendors.*

The abstract of title, which was lodged on July 12, 1887, is headed: "Abstract of title of Mrs. Anne Sherlock, Mrs. Christina O'Farrell, Nicholas Sweetman O'Farrell, and Edward Joseph

O'Farrell." It purports to set out the title of these three last-named people, and at the end it purports to state the will of Edward Richard O'Farrell, with the note "Copy lodged." The devise to Christina O'Farrell for life, with remainder to Nicholas Sweetman O'Farrell and Edward Joseph O'Farrell in fee-simple as tenants in common, and the appointment of the widow and the appellant as executors, are stated, but no reference whatever is made to the residuary gift, under which the property is now claimed. Nothing can be clearer than that this abstract was prepared as tracing the beneficial as well as the legal title to the lands through the devise, for if there had been a conversion, though the legal estate would be in the devisees, the beneficial owner would have been the residuary legatee, and as such he would have been made a separate party to the conveyance, the devisees being only trustees for him. The rulings of the examiner, and the requisitions upon the title, all proceed on this basis.

When the requisitions had been complied with, the conveyances were prepared and executed, making the tenant for life, and the two remaindermen, of whom the appellant was one, expressly convey *and covenant* as the "beneficial owners."

Having regard to these facts, I cannot doubt that, on the death of Edward Richard O'Farrell, his widow and sons did not merely carry out contracts of sale made by him which bound them, but that they determined to carry out the sales to the tenants on the terms to which he had consented, by virtue of their own beneficial interests under the devises to them contained in his will, treating the land as their lands, and the tenants as their tenants. *Frayne* v. *Taylor* (1) seems to me to apply the same principle which I adopt. Kindersley, V.-C., decided there that he would not allow the heir-at-law to change the basis on which he had performed the contract originally.

Here the parties carried out the intention of the testator by selling the lands to the tenants as their own; they stepped, as contracting parties, into the place of the testator, treating the document of January 24, 1887, as still incomplete; they made it a complete agreement by becoming parties to it, and signing the memorandum at foot, which is in these terms, omitting the residuary

(1) 33 L. J. Ch. 228.

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gift and treating the devisees as the beneficial owners. "Since the date of the within deed and before executing the same the within-named Edward Richard O'Farrell died, and by his will dated the 7th day of January, 1882, he devised (*inter alia*) the within mentioned lands and premises to his wife Christina O'Farrell for life, and after her death to her two sons Nicholas Sweetman O'Farrell and Edward Joseph O'Farrell in equal shares as tenants in common, and he appointed his said wife and the said Edward Joseph O'Farrell executrix and executor, respectively, of his said will. Now we, the said Christina O'Farrell, Nicholas Sweetman O'Farrell, and Edward Joseph O'Farrell, do hereby assent to and confirm the within mentioned indenture in all respects to the intent that it may be as effectual and as binding as if same had been executed by the said Edward Richard O'Farrell previous to his death, and *we agree* to do all necessary acts to carry its terms into execution." This memorandum is dated September 9, 1887, and is executed by Christina O'Farrell, Nicholas Sweetman O'Farrell, and Edward Joseph O'Farrell. The parties to that indorsement are, in my opinion, as much estopped from denying that they were the landlords and the owners, selling their own beneficial interests to the tenants, as the tenants by taking the conveyances were estopped from denying that those same parties were their landlords.

Meredith, J., has gone through all the orders and rulings which were made on the same basis. The lands and the purchase money, including the moneys in Court, have consistently been dealt with on the assumption that the three devisees *were* what they described themselves to be—the owners and the vendors. The appellant himself, on his own motion, obtained three orders recognising his position as the limited administrator of his brother, and he thus declared, as to his brother's share, that he was not himself the beneficial owner, but that he was only the trustee for others of the property which he now seeks to have paid over to him as his own.

Though, for the reasons I have given, I should be prepared to decide, in a suit for specific performance, that a contract of sale enforceable by the tenants against Edward Richard O'Farrell is not proved to have existed at his death, I need not go so far for the foundation of my judgment now. Even if I assume that there was a binding contract at the date of the testator's death, it was a

contract which had still to be carried out. The persons claiming under his will carried it out by taking it up as their own, claiming and conveying as "beneficial owners" under the devise to them. The appellant assumed this position; others, both his co-vendors and the tenants, acted upon his assumption, and it is enough for me to say that I hold him to it now.

Even if I were wrong in thinking that there was no binding contract sufficient to convert the property, or that the appellant can not now change his ground, I should still find it impossible to allow him, on a mere motion such as this, to appropriate the property which he has already repeatedly and finally declared himself to hold as the personal representative and limited administrator of his brother. I should at least require a suit to be instituted, and a decree to be obtained against the widow and children of Nicholas S. O'Farrell, after they had been formally represented, before depriving them of what seems to be all that they possess. In this aspect of the case, it is instructive to refer to the report of an application, *In the Matter of O'Farrells* (1) which was made to the Master of the Rolls. I am not satisfied, upon what appears in that report, either that the minors are properly represented here for the purpose of binding them, or that the Land Commission has jurisdiction, on a summary motion, to change the ownership of the funds in dispute and to pay them out to the appellant for his own use.

In any aspect of the case, it appears to me to raise questions quite too difficult for determination on such a motion as this. In the old phrase, the parties should at least "be put to a bill." Questions of novation, enforceability of contract, agent's authority, the Statute of Frauds, equitable conversion, and estoppel, seem to me to be more fit for a suit in equity than for a money motion before the Land Commission. In substance, in form, and in *forum*, I hold the appellant to be wrong now, and if he was ever right, he cannot now be heard to say that the land was his since 1887, which it never entered his head to claim until the year 1897. In my opinion we are not bound by any rule of equity to inflict wrong on the respondents, and if the judgment of Meredith, J., errs at all, it seems to me to err in allowing Edward Joseph O'Farrell any costs.

The appeal must, in my opinion, be dismissed with costs.

(1) 33 Ir. L. T. R. 81.

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WALKER, L.J. :—

I had originally, at all events, some difficulty in this case, and as Holmes, L.J., differs, I cannot say it is altogether removed, but I do not see my way to differ from the results at which Meredith, J., arrived. The ground upon which I rest my judgment is that I think all parties, Land Commission, tenants, and owners, treated the contract (so far as it was considered a contract) contained in the application for advance of 22nd December, 1886, as having come to an end upon the death of Edward Richard O'Farrell, and that the owners sold under a contract treated as made with themselves as beneficial owners, and not under any obligation arising out of the application of 22nd December, 1886.

It is quite true that all the Land Purchase Acts treat the existence of a contract to sell and purchase as a necessary condition for the making of an advance, and on the 5th April, 1887, when they sanctioned an advance they had one before them sufficient in form, according to their then rules, to justify that sanction. I am not disposed now to throw doubt on the authority of Mansfield as agent for the purpose of the application. He is described as authorized agent in the application, and he was so treated by the Land Commission. The looseness of the form then used rather goes to show that all the parties were looking to a date subsequent to the application as the time at which a binding contract would exist. It is true that there must be a contract to create jurisdiction to make an advance, but what I am endeavouring to ascertain is the intention of the parties, and the understanding of the parties, including that of the appellant.

Nor do I think it necessary to question in any way the decision of Bewley, J., in *Walsh's Estate* (1). I think this case stands apart from that decision.

In a case under the Land Purchase Acts there is not even a complete contract till the advance has been sanctioned. Both parties contemplate that the purchase-money shall be provided by the lending department which they have applied to. The strong probability is that when the advance was sanctioned on the 5th

(1) M'C. L.P. Cas. 100.

April, 1887, the death of Edward R. O'Farrell five days before was not known, but I shall assume it could be lawfully sanctioned after the death. If the Land Commission had known of it, I think they would have stopped the making of the advance till they had new contracts, either fresh ones or the old ones sanctioned by adoption. It was only as regards one-fourth of the lands that any difficulty was created by the death. The sale was to be made by conveyance, and what I think took place was that the Land Commission in effect said to the three owners, "You are, as you say, the beneficial owners: the tenants are your tenants: make a sufficient title to convey as beneficial owners, and we shall treat the sanction as operative, and give the money when you have made title." The first act done in order of time, so far as the facts have been disclosed, was the preparation of the abstract of title which was verified by Mr. Kenny on the 12th July, 1887. There were two further abstracts lodged which are not material. The abstract of July is described as "Abstract of title of Mrs. Anne Sherlock, Mrs. Christina O'Farrell, Nicholas Sweetman O'Farrell, and Edward Joseph O'Farrell." It states the will of Edward Richard O'Farrell without any mention of the residuary clause. I think this abstract presents to the Land Commission the deduction of a beneficial title in the three devisees. The next document in date is the memorandum of 9th September, 1887, indorsed on the deed, dated the 24th January, 1887, which had not been executed by Edward Richard O'Farrell in his lifetime. By it Edward Richard O'Farrell and Anne Sherlock had agreed to sell Tinnehalla and Retagh to the tenants at 15 years' purchase, the Land Commission to retain one-fifth of the purchase-money as a guarantee deposit. Each of the tenants was to pass his promissory note payable on 1st October, 1887, for a sum equal to one-half year's interest at £4 per cent. on his purchase-money, the notes to be payable to Mr. Kenny, and one-quarter of the proceeds to be paid to Edward Richard O'Farrell, the balance to mortgagees of Mrs. Sherlock. The indorsed memorandum of 9th September, 1887, recites the death of Edward R. O'Farrell, and that he had by his will devised the lands to his wife for life, and after her death to his two sons Nicholas and Edward in equal shares. It then proceeds—"Now we, the said Christina O'Farrell, Nicholas

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Sweetman O'Farrell, and Edward Joseph O'Farrell, do hereby assent to and confirm the within indenture in all respects, to the intent that it may be as effectual and as binding as if same had been executed by the said Edward R. O'Farrell previous to his death, and we agree to do all necessary acts to carry its terms into execution." That is, as I read it, "We who now own the lands will sell to the tenants and allow the Land Commission to retain the guarantee deposit." The next material act I find is the order of 30th July, 1888, by which £1500 out of the purchase-money was ordered to be set apart as an indemnity against, and to meet annuities on Tinnehalla, and this was placed to the "separate credit of the three owners," an act only consistent of course with their having in them the beneficial title. The next act is the proving of the will of Edward R. O'Farrell by the appellant on the 14th February, 1888; we have not been able to procure from the appellant's advisers a copy of the documents sworn and used on that occasion. I shall, from the non-production of those documents, and from what afterwards took place, assume that the appellant never put forward in them the contentions he now makes. In fact I would infer that he stated the opposite of what he now contends for. Next come the conveyances to the tenants which are all in the same form, and are dated in August, 1888. Taking the one to Butler, the parties are Anne Sherlock of the first part, her trustees of the second part, Christina O'Farrell, Nicholas S. O'Farrell, and Edward J. O'Farrell of the third part, the Land Commission of the fourth part, and the tenant of the fifth part. It recites the will of Edward Richard O'Farrell, and the devise, and there is also a recital "whereas the purchaser holds the holding hereinafter described as tenant to the vendors, and has agreed to purchase the said holding for the sum of £306, and has applied to the Land Commission to advance him the sum of £306 for that purpose." The vendors then convey as "beneficial owners." These statements in the deeds are the statements of all, including the Land Commission. No contract with Edward Richard O'Farrell is mentioned. The application seems to have been treated as having served its purpose when the advance was sanctioned; at all events tenancy, agreement, and conveyance are made referable to a beneficial title in the three devisees. So when the guarantee

deposit was retained in 1888 it was placed in the names of the same devisees, under an order of the Court to which the appellant is a party. The next very important matter is the death of Nicholas Sweetman O'Farrell on the 14th November, 1891. The appellant obtained administration to him *durante minoritate*. There were six children of Nicholas Sweetman O'Farrell, and the appellant made an affidavit for the purpose of administration in 1892, in which he swore that the deceased owned "a reversion in head rent," which I read as referring to the beneficial interest in reversion of Nicholas in the proceeds. The appellant still fills this position, and on the 11th June, 1893, he caused an order to be made by the Land Commission placing the guarantee deposit in the names of his mother and himself, one part as administrator of his brother, and one part in his own right. Christina O'Farrell died on 16th February, 1894, having received the income during her life, and up to 1897 orders were made dealing with the capital and income of the funds as if the beneficial title in one-half belonged to the children of Nicholas, on whose behalf he had obtained administration. Mr. Price for the appellant said all those payments could not now be recalled, and that they were like the snow of last year, and he relied on the familiar principle that when a fund is in Court it must be distributed according to the rights. I use all those acts and documents as confirmatory of what appears to me the real truth of the case was from the 5th April, 1887.

It appears that on the 17th June, 1896, the appellant and Rev. Denis Cavanagh were appointed by the Master of the Rolls guardians of the children of Nicholas, under the guardianship of Infants Act. We have not been informed of the circumstances under which the order was made, but in November, 1897, when the appellant was about instituting the present motion he obtained from the Master of the Rolls an order removing him from his office.

A question has been raised as to the jurisdiction of Mr. Justice Meredith to make any order dealing with the rights in the purchase moneys by summary motion. It is not necessary for me to express any opinion, but he himself does not express any doubt of his jurisdiction, and certainly the closing words of section 14,

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sub-section (1), of the Act of 1887 are very large, and probably amount to an independent provision, intended to put purchase moneys referable to a sale carried out by conveyance on the same footing as when carried out by vesting order. In the view I take of the case it is not necessary to consider the doctrines laid down in *Lawes* v. *Bennett* (1) and *Weeding* v. *Weeding* (2), which I think are now beyond controversy.

I doubt very much if, having regard to the terms of the agreement of 24th January, 1887, which are evidenced to have been those approved by Edward R. O'Farrell by the signature of the appellant to the memorandum of 9th September, 1887, that there was a complete contract binding the estate on the 22nd December, 1886, on the terms of the document. Mr. Kenny, in his affidavit, states, "I sent instructions to the late Mr. David Lynch, Q.C., to prepare an agreement, embodying the terms on which the sale had been arranged, and which agreement it was intended should be executed by Mrs. Anne Sherlock and the said Edward R. O'Farrell, the owners and the mortgagees." If this is so, how could there have been specific performance decreed of what was contained in the applications merely?

At all events, I think that by the consent of all—Land Commission and devisees—the advance sanctioned on 5th April, 1887, was treated as enuring for the benefit, beneficially, of the three devisees under the beneficial title conferred by the terms of the will of Edward R. O'Farrell. They, in that capacity, dealt with the tenants as contracting parties, and in that capacity conveyed. Christina O'Farrell and Nicholas O'Farrell, who might have given valuable evidence, are dead, and the appellant now endeavours, on a summary motion, supported almost exclusively by his own evidence, which leaves much to be desired in the way of information, and which is inconsistent with the documents and his own acts, to take away the fund from the minors, for whom he was guardian, and for whose benefit he proved the will of his father. I think he has failed to make out his case.

I concur with Lord Justice Fitz Gibbon, that the appeal should be dismissed.

(1) 1 Cox, Ch. Cas. 167. (2) 1 J. & H. 424.

Holmes, L.J. :—

Before referring to some special features of the present case, I propose to consider—1, whether the documents signed by the agent of Anne Sherlock and Edward Richard O'Farrell, the landlord, and their several tenants were agreements which, though subject to one or more conditions, carried with them an obligation from the time of their execution, and from which one of the parties was not at liberty to withdraw without the consent of the others; 2, whether if they were agreements, they were subject to a condition that if either of the landlords were to die before the advance was sanctioned by the Land Commission, they would thereupon cease to be operative; and 3, whether if they were not subject to this condition, and if, in pursuance thereof, the sales were carried out, there was as between the real and personal representatives of one of the landlords who died before the sanction was given, a conversion of the lands into personal estate as from the dates of the agreements.

As the documents were prepared and signed for the purpose of selling the lands through the machinery of the Land Purchase Act of 1885, regard ought to be had to the provisions of that statute in ascertaining their true construction; but the only matter of importance to be found therein bearing upon this subject is, that the advance of money by the Land Commission for enabling tenants to purchase their holdings thereby authorised, assumes that an agreement had been already made between the landlord and tenant for the sale of the holding. The amount which the Land Commission was at liberty to advance depended upon the amount of the purchase-money; and until the price was fixed by the parties, and until they had bound themselves to carry out the sale at the price so fixed, if the Land Commission consented to advance it either in whole or in part, it would have been premature, and perhaps useless, for the Land Commission to consider the matter at all. Accordingly the rules made under the authority of the Land Purchase Acts have, from time to time, provided a form of document which must be signed by the landlord and the tenant, and lodged with the Land Commission, as the preliminary step in the transaction.

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The several documents in this case are, I believe, in the form prescribed immediately after the passing of the Act of 1885, and in use until the end of the year 1887. It is an offer by the landlord to sell to the tenant at a price named, such price to be paid by an advance from the Land Commission, of which a certain sum, also named, was to be retained as a guarantee deposit. This offer or proposal, is signed by the landlord or his agent; and it is followed by a definite acceptance thereof signed by the tenant, who also thereby requests the Land Commission to advance the price upon specified terms and undertakes to execute the necessary deed to secure such advance.

The proposal and acceptance constitute, in my opinion, a complete contract, similar in kind to an agreement to sell a fee-simple estate for £10,000 subject to the condition that a certain Banking or Insurance Company in the habit of lending money would advance £3000 for the purpose of enabling the purchase to be completed on the security of the property, each party undertaking to use all reasonable diligence to procure the loan. In such a case the contract is binding from the first, but unless the proposed lender is willing to make the advance it cannot be carried out. An action, however, would lie at the suit of either party against the other for refusing to assist in obtaining the loan; and if the loan were procurable, it seems to me that either party could enforce specific performance of the contract.

Mr. Justice Meredith was disposed to think that the document signed by landlord and tenant was only an application for an advance; and he refers to its title or caption in support of this view. No doubt it was an application, but it was also an agreement. It was so framed as to fulfil a double purpose, being at once the contract which was the foundation of the application, and the application which was contemplated by the contract. For these reasons it seems to me that upon the execution of this document there was a complete agreement subject to an expressed condition. Was there also an implied condition to the effect that the agreement would be avoided by the death of the landlord before the sanction of the Land Commission to the advance was obtained? Contracts for the sale of lands are not put an end to by the death of one of the parties; and this is the general rule in

all contracts, the performance of which does not depend upon the personal labour or the personal qualities of one of the contracting parties. Mr. Justice Meredith seems to have thought that this personal element enters into the undertaking to provide a guarantee deposit; but I am unable to follow his reasoning on this subject. If the landlord had stipulated to lodge a certain sum with the Land Commission by way of guarantee deposit, the undertaking could be implemented out of his assets after his death as well as by himself while alive; but his obligation does not go as far as this. He only agrees that the deposit may be retained out of the sum advanced.

There remains to be considered the third question, whether the advance having been sanctioned after the landlord's death and the purchase carried out, the effect was to convert the vendor's interest in the lands into personal estate from the date of the agreement as between his real and personal representatives. This is the result where there is an absolute and unconditional contract for the sale of lands. It is said that the foundation of this doctrine is the right of each party to the agreement to have it specifically performed, and perhaps it is; but it has been extended to cases where a condition, the performance of which was a necessary preliminary to carrying out the sale, not only was not, but could not have been, performed in the lifetime of the vendor: *Lawes* v. *Bennett* (1); *Weeding* v. *Weeding* (2); and *Isaacs* v. *Reginall* (3). In these cases the person to perform the condition was the purchaser; but it is stated in the judgment in *Weeding* v. *Weeding* (2), that the same principle would apply if the conditions were independent of and beyond the control of the contracting parties, while in *Isaacs* v. *Reginall* (3) the purchaser was only entitled to exercise the option to purchase, which in that case was the condition to there being a sale at all, after the death of the vendor.

I am aware that some Judges have not been quite satisfied with what seemed to them an extension of the doctrine of conversion in the decision of these cases. They admit, however, that they ought now to be followed, and this is quite enough for me. The rules

(1) 1 Cox, Ch. Cas. 167. (2) 1 J. & H. 424. (3) [1894] 3 Ch. 506.

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regulating this branch of the law are largely artificial. It would be neither unreasonable nor inconvenient to regard the lands as the real estate of the vendor up to the time when the contract is carried out. But if the making of an absolute agreement to sell is fixed by judicial authority as the time of conversion, it seems to me that it is both logical and desirable to apply the same rule to a conditional agreement. No matter how absolute a contract for the sale of real estate may be in form there is no certainty that it will be carried out in fact. Even if the vendor is freed from all obligation to deduce title there must always be some interval between the date of the agreement and the execution of the conveyance, and in this interval the bank in which the vendor has lodged the purchase-money pending completion may fail, and he may be unable to complete at all. Moreover, most agreements for the sale of lands are subject to conditions, express or implied, as to showing a good title, and it is, I think, certain that the general rule applies to agreements of this kind. I am unable to see any good reason for not applying it in the case of all conditional contracts, but I do not undertake to justify by abstract reasoning the doctrine of conversion as applied in the decisions to which I have referred. Their best recommendation is the fact that they exist, and even if I did not approve of them, it is now too late to over-rule them.

Some light is thrown on this subject by authority of another kind. We have in this case to deal with conversion as between the real and personal representatives of the vendor, a conversion which may take place, as was pointed out by Chitty, J., when referring to *Edwards* v. *West* (1) in his judgment in *Isaacs* v. *Reginall* (2), when there is no conversion as between the vendor and vendee. It would, however, be difficult to maintain the converse of this proposition. If there is conversion between the vendor and vendee, it would seem to follow that there must also be conversion between the real and personal representatives of the vendor. Now there arose, very soon after the form of agreement now under consideration came into use, the question whether the landlord could recover rent from the tenant between the date of the agreement and the sanction of the advance. This was very carefully

(1) 7 Ch. D. 858. (2) [1894] 3 Ch. 506.

considered by Palles, C.B., in the civil bill appeal of *Hussey* v. *Morgan*, an unreported case referred to in *Jackson and Verner* v. *Irvine* (1), and well known to the legal profession. There the landlord, before the advance was sanctioned, sued for rent that accrued after the date of the agreement, and it was held that in such a case it was impossible to determine whether the tenant was liable to pay rent or interest, until the Land Commission finally decided whether the sale would be carried out or not. This decision was followed by other Judges, and the Legislature, apparently in consequence of these cases, enacted in the third section of 51 & 52 Vict. c. 49, that the approval of the Land Commission to an advance shall be signified by a dated order, and from and after such date the vendee, in the event of the sale being carried out, shall be discharged from all liability to the vendor in respect of any liabilities affecting the holding, including all rent and arrears existing at the date of the agreement for sale between the landlord and tenant, provided that the vendor shall be entitled to recover from the vendee interest in lieu of rent for the period that may elapse between the date of the signing the agreement for sale and the date of the completion of the sale by the Land Commission, unless the parties shall have otherwise agreed. This seems to me to be a recognition by the Legislature that the completion of a sale under the Land Purchase Acts has the effect of converting the lands into money as from the date of the agreement. Of course a contract for the sale of lands may show that no conversion is to take place until either completion or some intermediate date; but there is nothing from which such an inference can be drawn in the present case, and no assistance can be gained from speculating on the intention of the vendor. We know how he intended to dispose of his lands when he made his will, but we have no means of knowing how, fourteen years later, he would have disposed of the money for which the lands were sold.

The result, then, of my consideration is to answer my first and third questions in the affirmative, and my second in the negative. Mr. Justice Meredith would have answered at least two of them

(1) 28 L. R. Ir. 473.

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differently, and as a necessary consequence he held that the lands retained the character of real estate at the time of the death of Edward R. O'Farrell. Before I can finally come to the opposite conclusion it is necessary for me to refer to some matters subsequent to his death, which were dealt with very fully by Mr. Justice Meredith, without, however, making them the grounds of his judgment.

The sanction of the Land Commission to the advances named in the agreements was given within a few days of the death of Edward R. O'Farrell, and probably in ignorance of it. If I am right in holding that the agreements continued to be binding and operative notwithstanding his death, it is immaterial whether the Land Commission knew of it or not when the sanction was given; nor was it necessary that either landlord or tenant should be represented on that occasion.

The next step was for the vendors to deduce title. Edward R. O'Farrell's real estate, in Co. Waterford, passed under his will to Christina O'Farrell, his wife, for life, with remainder to his two sons, Nicholas S. O'Farrell and Edward Joseph O'Farrell, the last of whom was also his residuary legatee, and the executor who obtained probate. These three persons represented both the real and personal estate, and therefore were the proper persons, together with Anne Sherlock, the co-owner, to make title to and convey the property. No inference against conversion can be drawn from their doing so. It is what always happens where a vendor dies before a contract for the sale of lands, made by him in his lifetime, is carried out. The contract binds his representatives, real and personal; and the purchaser, who is not called on to embarrass himself with their rights, *inter se*, is entitled to require them all to furnish an abstract of title and to convey. This was the position of the Land Commission. As far as I am aware, it had no jurisdiction where the sale was to be carried out by conveyance to ascertain judicially, before conveyance, in whom the estate was vested; and the purchase could only be completed by the joint action of the several persons I have named.

After the title had been found satisfactory, and before the purchase-money was paid into the Bank of Ireland, an order of the Land Commission was made, dated the 30th July, 1888.

It had appeared on the investigation of title that Edward R. O'Farrell's share of the lands sold, together with his share in other lands, were subject to two life annuities of £35 and £30 respectively; and it was necessary that the lands sold should be indemnified against these annuities by the unsold estate and by the purchase-money. This was carried out by the order referred to, which directed that Edward R. O'Farrell's share in the unsold lands should indemnify the sold lands against the annuities, and that, as a further indemnity, the sum of £1500 should be retained out of the purchase-money, and placed to the separate credit of Christina O'Farrell, Nicholas S. O'Farrell, and Edward Joseph O'Farrell. The reason of placing it to the separate credit mentioned was, that Anne Sherlock's share of the lands was not subject to the annuities; and therefore the indemnity was to be provided entirely out of the money that represented Edward R. O'Farrell's share. The matter was entitled in the names of the four owners, and the sum therefore could not be allowed to stand to its general credit. But when the order provided that it "should be placed to the credit of this matter and the separate credit of the said owners, save Anne Sherlock," no adjudication as to the rights of the three O'Farrells, *inter se*, was made or contemplated. This is abundantly clear from the order itself, and it is demonstrated by the ruling of the 11th April, 1890, providing for the payment of the dividends of the indemnity fund. They are directed to be paid to the applicants in equal shares on the production by them of receipts up to the latest gale-day for payment of the annuities. I am disposed to think that the words "in equal shares" came into this ruling, *per incuriam;* but whether they did or not, it is quite clear that the ruling is carefully framed to avoid an adjudication upon the respective rights of the parties. If there had been no conversion, the dividends ought to have been paid to Christina O'Farrell, the tenant for life; but what the Court did was, to pay the dividends to the three, leaving them to adjust the rights amongst themselves.

Precisely the same course is taken in the register of guarantee deposits. The sum representing Edward R. O'Farrell's share is registered in the name of the three, and the interest directed to be paid, not to the mother, but to them all. Nicholas S.

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O'Farrell died in November, 1891; and whatever were the rights of the parties *inter se*, the Land Commission would not have been justified in paying either principal or dividends until a personal representative was raised to him and made a party to the matter. Edward Joseph obtained letters of administration to his brother; and by a ruling of the 11th January, 1893, the register was amended by striking out the name of Nicholas and substituting therefor the name of Edward Joseph as limited administrator, and the interest was directed to be paid to the latter and Christina O'Farrell until further order. Here again everything shows that the rights of the parties *inter se* were kept open. Christina, the mother, died in February, 1894; and, as far as I can gather, no payment of either principal, dividends, or interest has been made since.

I have taken the statement of the foregoing proceedings and orders from the judgment of Mr. Justice Meredith, where I have no doubt they are correctly given; but copies of them have not been furnished to the Court, and they were only referred to by counsel in the most general terms. I have shown that, as far as the Land Commission is concerned, there has never been until the order appealed from, an adjudication on the rights of the parties; and knowing the care and experience which Mr. Commissioner Lynch brings to the discharge of his duties, I have no doubt that the rulings were made advisedly in a form which precludes the idea of such an adjudication. Nor can an inference be drawn from these transactions that Edward Joseph O'Farrell had agreed to give up or transfer to another any right he had to the purchase-money. If there was conversion, it arose from an act done by the testator in his lifetime, the effect of which was to confer on Edward Joseph O'Farrell, when the contract was carried out, a property which it would require a deed or an agreement for valuable consideration to deprive him of. The very strongest inference against him to be deduced from the matter I have referred to is either that he was ignorant of his rights, or that he allowed his mother during her lifetime to receive money which he could have claimed for himself; and whichever of these views is taken, it cannot supply an answer to his present application.

There remains another question, not very strenuously argued

indeed, but not to be passed over in silence. Of course conversion depends upon the contract made by the deceased man being carried out. If the parties interested agree, after his death, to rescind it, or to substitute another contract for it, there is no conversion. There is not a particle of evidence in this case of such rescission or substitution up to the conveyance. Neither is there any evidence of it after the conveyance. The contracts could only be rescinded by agreement between the landlords and tenants; and the only thing done by the latter after signing the agreements was to execute the conveyance. Therefore if evidence of rescission and substitution is not to be found in the conveyance, it cannot be found elsewhere.

The conveyances are all in the same form. The parties are Anne Sherlock of the first part, her trustees of the second part, the three O'Farrells of the third part, the Land Commission of the fourth part, and the tenant of the fifth part. There is recited the will of Edward R. O'Farrell, in so far as it disposes of the lands, and that probate thereof was granted to Edward Joseph O'Farrell. The O'Farrells, along with Anne Sherlock, are described as vendors, they convey as beneficial owners, acknowledge the receipt of the purchase-money, and consent to the retention of the guarantee deposit. This is the form which the deeds would have assumed if they had been prepared for the purpose of carrying out the agreements to which Edward R. O'Farrell was a party. Therefore the matters I have mentioned are no evidence of substituted agreements. The only thing I can find in the conveyances calculated to suggest even a doubt, is the non-recital of the contract made in Edward R. O'Farrell's lifetime. There is instead a recital in the following words: "Whereas the purchaser holds the holding hereinafter described as tenant to the vendors, and has agreed to purchase the said holding for the sum of £306, and has applied to the Land Commission to advance him the sum of £306 for that purpose." Now, a person knowing nothing of the circumstances would probably assume from those words, that the agreement had been made with the four vendors; but there is no statement to this effect—much less is there an estoppel preventing any of the parties from showing the truth of the transaction; and once we go outside the deed, there is no room for

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doubt. The only agreement entered into by the tenant, and the only application made by him to the Land Commission, was the document signed and lodged in Edward R. O'Farrell's lifetime. To hold the contrary would be to hold that the Land Commission made an advance in violation of its own rules, without a preliminary agreement or application, that some further negotiations took place between the landlords and the tenants after Edward R. O'Farrell's death, that these negotiations terminated in new agreements never reduced to writing, which if not qualified by a stipulation to the contrary, would render the tenants liable to pay rent up to that date, and that all this was done for no intelligible purpose or object. It is possible that our law would have been none the worse if the doctrine of equitable conversion, in all its branches, had never been introduced into it; but I am not prepared to get rid of its consequences in the present case by assuming the rescission of one contract and the substitution of another, not merely without evidence, but in defiance of what seems to me to be the clearest evidence. For these reasons, I am of opinion that the result of this appeal depends upon the three questions with which I started, and the answers I have given thereto lead me to the allowance thereof.

Solicitor for the appellant: *Thornton.*

Solicitors for the respondents: *Dobbyn, Tandy & M'Coy.*

G. Y. D.

ELIZABETH H. MASSY, GRANTEE; ALICE E. WEBB, GRANTOR (1).

Land Com. 1899. Jan. 26.

Landlord and tenant—Land Law (Ireland) Acts, 1881-1896—*Character of holding—Residential holding—Conversion of agricultural into residential holding.*

Under a fee-farm grant, dated in 1858, an owner of landed property took agricultural land, situate in the centre of a hunting and fishing district, for the purpose of building a residence, which he subsequently did. The grant contained no reference to this purpose:—

Held, that the character and user of the holding had been mainly residential, and that the agricultural holding had been converted into a residential holding.

APPEAL from an order of the Sub-Commission dismissing the originating notice. The facts appear fully in the judgment.

G. Lawrence, for the grantee.

P. D. Fleming, for the grantor.

MEREDITH, J.:—

The application to fix a fair rent in this case was dismissed by the Sub-Commission, presided over by Mr. Crean, on the ground as stated in the order, that the "holding is neither agricultural nor pastoral in its character within the meaning of the Land Law Acts." This was the form of order used prior to the Land Act of 1896 in the case of residential holdings, and Mr. Crean's decision was that the holding before the Court came within that category. The legal aspect of the case is not free from difficulty, although the facts relating to the origin and history of the holding are comparatively clear and simple. It appears that in the year

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1858 Mr. William Rogers Johnston, a gentleman of fairly independent means, was residing at Spring Garden Cottage, Mallow. For reasons, which he mentioned during the course of his examination before us, he desired to change his residence; but being a sportsman, he was anxious to remain in the vicinity of Mallow in the centre of the hunting and fishing district. In addition to other property he was the owner in fee-simple of landed property producing an income which he estimated at from £300 to £400 a-year. He endeavoured to find a residence existing and available to suit his requirements, but failed, owing, as he stated, to the demand in the neighbourhood for residences of the character he sought for. He then resolved to make a home for himself. He was aware that Mr. Kingsmill Brady, a land-owner and mill-owner, had in his possession lands (within 1½ miles from Mallow) which appeared to afford an eligible site for the erection of a residence suitable to a gentleman of his position and tastes. These lands adjoined, and at one time formed part of, Harrietville. Accordingly, he went to Mr. Brady, and if his evidence is true (and we see no reason to doubt its accuracy) he asked Mr. Brady to make a letting to him of lands to build a residence on, as he could not live where he was. The parties met subsequently at the office of Mr. Le Bagge (who was Mr. Brady's solicitor); the land was earmarked, the terms of letting were agreed on, and Mr. Brady undertook to give Mr. Johnston a supply of building-sand free of charge; which undertaking he afterwards fulfilled. On the 23rd March, 1858, a fee-farm grant comprising the holding before the Court was executed. [His Lordship referred to the grant.] It is a somewhat singular fact that the grant contains no indication of any intention on the part of the grantee to build, and imposes no obligation upon him to do so. In itself it appears an ordinary "lease for ever" of 38A. 3R. 26P. forming part of the lands of lower Quarter town, subject to the yearly fee-farm rent of £73, being as nearly as possible at the rate of £3 per Irish acre. Mr. Fleming (who appeared for the present landlord) called our attention to the description of the grantee, the reference to timber in the *habendum*, and the tenure, but admitted that, apart from these elements, the document constituting the contract of letting afforded no assistance to his argument. Mr. Johnston, however, having

obtained his grant, proceeded to make good the representation on the faith of which he had obtained it. He built a dwelling-house suitable to his means and position; he erected a stable and coach-house; he planted at both sides of the avenue; he made a nice fruit garden, and supplied it with the best fruit trees, and he maintained a "lawn" without which no gentleman's residence appears to be complete. His expenditure in reference to these matters he estimated at £1000. He called his new home "Hermitage," and went to reside there. Mr. Lawrence, who appeared for the tenant (Mrs. Massy), cross-examined Mr. Johnston with the object of eliciting the information that the 38 or 39 acres comprised in the letting were not exclusively devoted to residential purposes. Mr. Johnston of course farmed the land which he held in connexion with his residence. He kept cows, and sold the milk not required for use in the house; he kept sheep, and he tilled the "back fields" (as he stated) for the use of the house. He increased the area of his agricultural operations (in the year 1865) by taking 17 acres of the adjoining lands at a rent of £27 per annum. I may say in passing that he stated that he acquired this additional land for the purpose of a passage. Nevertheless his evidence convinced us that in his hands the holding before the Court became, and was used substantially as, a gentleman's residence with some land attached, and not as a farm with a residence upon it suitable to a gentleman farmer. Mr. Johnston continued to reside at Hermitage for several years. In the year 1872 he sold Hermitage and the 17-acre holding to Mr. Massy, the late husband of the present applicant.

It appears from the evidence of Mrs. Massy that her husband was the land agent of Mr. Putland, the owner of somewhat extensive estates near Glanmire and Blarney, and that Mr. Putland wished his agent to reside within easy reach of the estates. Mrs. Massy describes her husband as a practical farmer who had worked and managed a large farm for his father before he accepted the post of land agent to Mr. Putland; and she says that her husband's object in taking Hermitage was to increase a somewhat slender income by means of farming operations. According to her own account, however, Mr. Massy improved and accentuated the residential aspect of Hermitage, built a "gate-lodge" for a

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MASSY *Grantee;* WEBB, *Grantor.*

Meredith, J.

labourer, walled in the garden, planted additional trees, and otherwise improved the appearance of the place. Mr. Massy died in 1878, and his widow has since continued to reside in the house. She sets the grass of the land or uses it in meadow; her husband kept half in tillage. What has been the character and user of the holding during the occupancy of Mr. Massy and his widow? As jurors, we hold that the character and user has been mainly residential. The evidence of Mr. Wray and Mr. Evans confirms the view that the holding is more suitable to residential than to agricultural purposes. Mr. Evans considers the house, garden, avenue, and lodge alone worth from £60 to £66 per annum, while he values the land at £61. The Poor Law valuation of the buildings is £20 10*s.* The valuation of the land does not appear, as this holding and the 17-acre holding are valued together at £62 10*s.*

Now, upon these facts it is plain that if the decision of the Sub-Commission is correct, the tenant has built himself out of the benefit of the Land Law Acts. No doubt this can be done; but *Moonan* v. *Conyngham* (1) and *Gloster* v. *Ryan* (2) demonstrate that the doctrine of conversion by the tenant of an agricultural into a non-agricultural or residential holding, is one that should be applied with great care and caution, and only under special, I may say exceptional, circumstances. Not without hesitation we have come to the conclusion that there are such circumstances here. If Mr. Johnston himself were the applicant, what Court after his evidence could fix a fair rent? How can his assignee be in a better position? The main, the dominating, object with which Mr. Johnston sought and obtained the grant of 1858 was for a residence; the *raison d'etre* of the existence of the holding as a separate entity was that of residence; the main use to which the holding has been applied is that of residence. Now the 5th section of the Act of 1896 (sub-sect. 1) provides that the Land Law Acts "shall not apply to a tenancy in any holding which is not substantially either agricultural or pastoral in its character, or partly agricultural and partly pastoral, or the main object of the letting of which was for a residence." Mr. Lawrence contends

(1) [1895] 2 I. R. 1. (2) [1899] 2 I. R. 174.

that these words imply the existence prior to, and at the date of, the letting of a dwelling-house and residence fit for immediate occupation. I think that this is too narrow an interpretation of the words. In my opinion the words are clearly wide enough to embrace a case where by express contract and obligation the tenant to whom land is let is bound to create and maintain a residence. If this be so, are we straining the law in holding that in a case like the present where representation made by the tenant, acted upon by both parties, and carried into effect, takes the place of express contract? I do not think we are. The originating notice must therefore be dismissed.

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Solicitors for grantee: *T. W. Hardman & Son.*
Solicitor for grantor: *E. K. Sherlock.*

W. C. S.

R. D. WORKMAN, TRADING AS WORKMAN & CO., *v.* THE BELFAST HARBOUR COMMISSIONERS (No. 2) (1).

Q. B. Div. 1899. July 5.

Practice—Taxation of costs—Motion—Three counsel—Refreshers.

Where a motion is of a serious character, and involves difficult questions of law, three counsel will be allowed, as between party and party.

On a motion to stay an action and refer the matters in dispute to an arbitrator, on the ground that they came within a clause in a contract agreeing to refer matters in dispute between the parties in the settlement of the accounts to arbitration, the Court allowed, as between party and party, three counsel and refresher fees.

MOTION on behalf of the defendants to review taxation.

The plaintiff sued to recover £49,000 for extras on a contract entered into by him with the defendants for the construction of a

(1) Before BOYD, J.

Q. B. Div. 1899.

WORKMAN v. BELFAST HARB. COM. (No. 2).

dock, and for damages for fraudulent concealment of facts material to the contract, and for damages for breach of contract by the defendants. The defendants moved to stay the action and refer it to an arbitrator, on the ground that the matters in dispute were properly the subject of arbitration, under a clause in the contract agreeing to refer all matters in dispute in the settlement of the account to arbitration (1). The Court refused that motion with costs. The Master in taxing the costs of the motion allowed three counsel and refresher fees. The defendants now moved to review the taxation as to these items. The following are the items objected to:—

	£	s.	d.
34. Brief for Mr. Hume,	6	0	2
35. Copy notice to annex,	0	1	0
36. Attending him therewith,	0	6	8
37. Paid his fee,	9	9	0
64. Docket of refresher for Mac Dermot,	0	3	4
65. Attending him therewith,	0	6	8
66. Paid his fee,	8	8	0
67. Docket of refresher, Serjeant Dodd,	0	1	0
68. Attending him therewith,	0	6	8
69. Paid his fee,	8	8	0
73. Docket of refresher for Mr. Hume,	0	1	0
74. Attending him therewith,	0	6	8
75. Paid his fee,	5	5	0
77. Docket of refresher for Mac Dermot,	0	3	4
78. Attending him therewith,	0	6	8
79. Paid his fee,	8	8	0
80. Docket of refresher for Serjeant Dodd,	0	1	0
81. Attending him therewith,	0	6	8
82. Paid his fee,	8	8	0
86. Docket of refresher for Mr. Hume,	0	1	0
87. Attending him therewith,	0	6	8
88. Paid his fee,	5	5	0
90. Docket to hear judgment,	0	3	4
91. Attending The Mac Dermot,	0	6	8
92. Paid his fee,	2	2	0
93. Docket for Serjeant Dodd,	0	1	0
94. Attending him therewith,	0	6	8
95. Paid his fee,	2	2	0
99. Docket for Mr. Hume,	0	1	0
100. Attending him therewith,	0	6	8
101. Paid his fee,	2	2	0

(1) See [1899] 2 I. R. 234.

A. H. Bates, Q.C., in support of the motion :—

It is a matter of discretion as to whether three counsel should be allowed in a motion in this Division. We contend they should not be allowed here: *The South Meath Election Petition* (1). In the case of refreshers there is an absolute rule settled by the Court of Appeal that they cannot be allowed on motions, save new trial motions and injunction motions: *Lynch* to *Chance* (2); *Goodison* v. *Whelan* (3).

Serjeant Dodd, and *M^c^Gonigal*, *contra* :—

The motion was of a most important and serious nature, involving the whole action. Three counsel were necessary on such a motion. The Taxing Master has exercised his discretion on this point. The refreshers were also properly allowed. In *Lynch* to *Chance* (2) the Court of Appeal merely laid down that in "ordinary interlocutory motions" refreshers should not be allowed. This was not an ordinary interlocutory motion. It was really a motion in the nature of a motion for an injunction.

BOYD, J. :—

I think this was a case eminently requiring the attention of three counsel. It was a very important case involving intricate legal questions, and one which the Court, of which I was myself a member, considered should not be referred to arbitration under the clause in the contract. The arguments occupied three days, and we came to the conclusion that, having regard to the important questions of law involved, we should refuse the motion. I think the observations of Lord Justice Fitz Gibbon in *Lynch* to *Chance* (2) as to refreshers, were intended merely to define *the class of cases* in which refreshers should be allowed, that is, such as new trial motions and injunction motions. In my opinion there could be no more important injunction motion than a motion to stay an action and refer it to arbitration. Such a motion is within the category which I presume Fitz Gibbon, L.J., meant, when he mentioned injunction motions. I think this motion was of a

(1) 32 L. R. I. 407. (2) 30 L. R. I. 278. (3) 9 Ir. L. R. 90.

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kind to require the continued attention of counsel. I therefore sustain the rulings of the Taxing Master and refuse this motion with costs.

Solicitor for the plaintiff: *W. B. Galway.*
Solicitor for the defendants: *Edward Bates.*

J. M°G.

Appeal. 1899.

Feb. 27. May 2.

M'CARTHY, TENANT; BENNETT, LANDLORD (1).

Landlord and tenant—Contract that tenant was to have the benefit of future legislation—Future tenant—Land Law (Ireland) Act, 1896, ss. 10, 17, 18.

By agreement dated the 31st August, 1886, made between B. and M., after reciting that M. had proposed to B. to become his future tenant for the term and at the rent thereafter mentioned of portion of the lands of K. previously occupied by M., B. agreed to let the said lands to M. for the term of twenty-one years from the 1st May, 1886, at the rent of £27 10s. The agreement further provided that in the event of any Act of Parliament being passed whereby tenants holding under leases theretofore made should have extended to them the benefits of the Land Law (Ireland) Act, 1881, or any other Act to be passed dealing with the relationship of landlord and tenant in Ireland where tenants hold under lease, it was agreed that M., his executors, administrators, or assigns should, in respect of the lands and the tenancy thereby created, be entitled to the benefit of any Act so to be passed.

At the date of the agreement B. was tenant for life of the lands. B. died, and was succeeded by his son as tenant in tail in remainder. On the 15th October, 1896, M. served notice to fix a fair rent. The provisions contained in the Rules of 1897, Rr. 164–170, had not been complied with:—

Held (reversing the decision of the Land Commission), that the tenant was not entitled to have a fair rent fixed.

The facts in connexion with this holding were as follows:—By lease dated the 25th September, 1863, Francis Evans Bennett demised the lands in question to Michael Connolly for three lives.

(1) Before LORD ASHBOURNE, C., and FITZ GIBBON, WALKER, and HOLMES, L.JJ.

In 1884 Connolly assigned one-half of the premises to Felix M'Carthy, his son-in-law, without obtaining the landlord's consent; and he afterwards assigned the other half to one Donovan, who was his son-in-law. In 1885 the landlord served a writ for rent on Connolly, recovered judgment, and having bought in the interest under the lease at the sheriff's sale, he obtained an assignment from the sheriff, on which he brought an ejectment in the Superior Court. Judgment was obtained by default, and an *habere* was issued, under which the sheriff was about to give him possession, when a settlement was come to that each of the tenants, M'Carthy and Donovan, was to have a new letting of his own portion as an independent take.

By agreement dated the 31st August, 1886, after reciting the ejectment, and further reciting that "Felix M'Carthy hath proposed, and doth hereby propose, to the said Francis E. Bennett to become his future tenant for the term and rent hereinafter mentioned of that portion of said lands of Knockaneacrohy as heretofore occupied by said Felix M'Carthy under some agreement or understanding between him and the said Michael Connolly," M'Carthy agreed to take from Francis Evans Bennett that part of the lands of Knockaneacrohy containing 51 acres for the term of 21 years, from the 1st May, 1886, at the rent of £27 10s.

The third clause of the agreement was to the following effect:—3. "In the event of any Act of Parliament being passed whereby the tenants holding under leases heretofore made shall have extended to them the benefits of the Land Law Act, 1881, or any other Act to be passed dealing with the relationship of landlord and tenant in Ireland where tenants hold under lease, it is agreed that the said Felix M'Carthy, his executors, administrators, or assigns, shall in respect of those lands and the tenancy hereby created be entitled to the benefit of any Act to be passed." A lease was to be prepared, which was to contain, in addition to the foregoing, all usual covenants between landlord and tenant. Francis Evans Bennett was tenant for life of the estate, with a power to make leases for 41 years at the best rent.

After the Act of 1887 was passed, Donovan and M'Carthy both served notices to fix fair rents. Donovan got a fair rent fixed, the landlord offering no opposition. M'Carthy's case was

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fought, and a fair rent was fixed by the Sub-Commission. An appeal was lodged, but pending the appeal the landlord died. The proceedings were continued in the name of his son, Francis Bennett, who was tenant in tail in remainder. On the 31st January, 1893, the Land Commission gave judgment, reversing the decision of the Sub-Commission, and dismissing the originating notice, on the ground that at the date of the agreement of the 31st August, 1886, the then landlord was only tenant for life.

On the 15th October, 1896, Felix M'Carthy served another originating notice to fix a fair rent, and the Sub-Commission fixed a fair rent. On appeal, the Land Commission, on the 28th November, 1898, affirmed the decision of the Sub-Commission, and from that order the landlord appealed (1).

Ronan, Q.C., and *P. D. Fleming*, for the appellant:—

The document of the 31st August, 1886, is an agreement for a lease for twenty-one years, which must be construed as a whole. We say that the case does not come within sect. 17 of the Act of

(1) The following judgment was delivered by MEREDITH, J.:—

The tenant before the Court holds under an agreement dated 31st day of August, 1886, for a term of twenty-one years, from the 1st May, 1886. *Prima facie* therefore the tenant is excluded from the benefit of the Land Law (Ireland) Acts. The tenant, however, contends that he is entitled to have a fair rent fixed by virtue of a special clause inserted in the contract of letting in (as he alleges) intelligent anticipation of the provisions of the Land Act of 1896. The document of letting is a short one, and as it states (with one important exception) the facts necessary to the decision of the question of law argued before us, I shall read it. [His Lordship read the agreement.] The one important exception to which I have referred is the fact that Francis Evans Bennett, the lessor, was only tenant for life of the property comprised in the agreement. Before dealing with the special difficulty caused by this circumstance it is necessary to consider and determine what the position of the parties to the agreement would have been on the assumption that the lessor was owner in fee-simple. The Sub-Commission presided over by Mr. Crean held that the effect of clause 3 of the agreement was to bring the tenancy within the scope and operation of the 18th section of the Land Act of 1896, which is as follows:—"Where, prior to the commencement of this Act, the landlord of a holding has consented that the tenancy in the holding should be a present tenancy, or that the tenant should have the same rights as a present tenant, the tenancy shall be deemed to be a present tenancy accordingly." Mr. Crean held that on the

1896. By the agreement the tenant agreed to become a future tenant, and there has been nothing to alter his position or to show that he is to become a present tenant. The clause does not alter the nature of his tenancy at all, and no Act of Parliament has been passed to give future tenants the right to fix a fair rent. Again, the lessor in the agreement of the 31st August, 1886, was tenant for life. Sect. 17 of the Act of 1896 (*d*) provides that landlord and tenant may agree to the creation of a present tenancy in the holding, but it can only be done subject to the prescribed rules. These rules are Rules 164 to 176 of the Rules of the 2nd January, 1897, and they have not been complied with in this case. Under sect. 10 of the Act the limited owner has large powers. The result is that after the passing of the Act the tenant for life could only create a present tenancy in the holding under the conditions prescribed in sect. 17.

T. M. Healy, for the tenant:—

A tenant can exclude himself from future legislation: *Ferguson*

true construction of the 3rd clause in the agreement of 1886 it amounted to a contract between the lessor and lessee that in the event of an Act of Parliament being passed rendering it possible for a tenant in the position of M'Carthy to have a fair rent fixed, then M'Carthy should be entitled to the benefit of such Act. He further held that the 18th section of the Act of 1896 had made possible what was theretofore impossible, and he declared the tenant entitled to have a fair rent fixed. It is necessary in order to follow the view taken by Mr. Crean to bear clearly in mind the grounds upon which tenants in the position of M'Carthy were excluded from the benefits of the Land Act of 1881, particularly the substantial benefit of having a fair rent fixed under the 8th section of that Act. In the case of *Magner* v. *Hawkes* (No. 1) (28 L. R. Ir. 365) —I may say, to avoid confusion, that this is not the leading case of *Magner* v. *Hawkes* (32 L. R. Ir. 285).—Mr. Justice Bewley discussed the position of leaseholders under the Act of 1881. The tenant in *Magner* v. *Hawkes* held under a lease executed between the 22nd August, 1881, and the 1st January, 1883, the lease being a lease of lands in which a tenancy was subsisting on the 22nd August, 1881, and Mr. Justice Bewley held the tenant to be a present tenant and entitled to have a fair rent fixed. At p. 367 of the report, the learned Judge remarks: "As I pointed out in the course of this case, the real question is whether, irrespective of the Land Act of 1887, the tenant is not entitled to maintain the present application. Under the 8th section of the Act of 1881 the tenant of any present tenancy to which this Act

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v. *Bradstreet* (1). It is difficult to find words to include him; the clause means, "if any leasehold is brought within the benefit of the Act, you are to be brought in." The recital about the future tenancy is at the commencement of the agreement; and then clause 3 contains the provision giving the benefit of future legistion. It could not be drawn in wider terms. The landlord was a tenant for life, and sect. 17 was passed to enable tenants for life to create a present tenancy with a proper protection for the remainderman.

LORD ASHBOURNE, C.:—

This is an appeal from the Land Commission, and turns upon the construction of a certain agreement for a lease dated the 31st August, 1886, and of some few provisions of the Irish Land Act of 1896.

The agreement was made between Francis E. Bennett of the one part, and Felix M'Carthy of the other part, and contained the following recital:—"Whereas the said Felix M'Carthy hath pro-

applies (*i. e.* any present tenancy not specially excepted from the operation of that Act) is entitled, during the continuance of such tenancy, to apply to the Court to fix a fair rent of the holding. The 58th section specifies certain classes of tenancies such as non-agricultural holdings, demesne lands, town parks, &c., to which the Act does not apply, and in addition it is provided by the 21st section that any leases or other contracts of tenancy existing at the passing of the Act, except yearly tenancies and tenancies less than yearly tenancies, shall remain in force to the same extent as if the Act had not passed. . . . By the 57th section a present tenancy is defined as a tenancy subsisting at the time of the passing of the Act, or created before the 1st January, 1883, in a holding in which a tenancy was subsisting at the time of the passing of the Act; and it is declared that every tenancy to which the Act applies shall be deemed to be a present tenancy until the contrary is proved. In the present case the lease was not in existence at the date of the passing of the Land Act of 1881, and therefore does not come within the 21st section of the Act. A tenancy was admittedly subsisting in the holding at that date, and the tenancy under which the tenant now holds was created in the interval between the passing of the Act and the 1st January, 1883. Under these circumstances the tenancy falls within the precise words of the definition of a present tenancy contained in the 57th section. But for the 21st section leaseholds as well as tenancies from year to year would

(1) 22 L. R. Ir. 303.

posed and doth hereby propose to the said Francis E. Bennett to become his future tenant for the term and rent hereinafter mentioned," and also the following clause, that "in the event of any Act of Parliament being passed whereby the tenants holding under leases heretofore made shall have extended to them the benefits of the Land Law (Ireland) Act, 1881, or any other Act to be passed dealing with the relationship of landlord and tenant in Ireland, where tenants hold under leases, it is agreed that the said Felix M'Carthy, his executors, administrators, and assigns shall in respect of these lands and the tenancy hereby created be entitled to the benefit of any Act so to be passed."

The tenant served a notice to have a fair rent fixed on the 5th October, 1896, and the landlord resisted the claim on two broad grounds:—1, that on the construction of the agreement he was a future tenant only; and 2, that Francis Bennett was only a tenant for life, and that in the events which happened he had done nothing which could bind the remainderman, the present landlord.

have come within the provisions of the Land Act of 1881 relating to the fixing of a fair rent, and I can find nothing in the Act preventing a leaseholder holding under a lease executed between the 22nd August, 1881, and 1st January, 1883 (whose holding does not fall within any of the exceptions contained in the 58th section), from taking proceedings under the Act of 1881 to have a judicial rent fixed." Mr. Justice Bewley goes on to point out that the same question arose in *Howell* v. *Briscoe* (20 Ir. L. T. R. 15), and that Mr. Justice O'Hagan there said:—"The section (that is, the 8th section of the Act of 1881) is not restricted to tenants from year to year. There is nothing to prevent its application to a lease if the lessee be a present tenant as defined by the Act." Further on, Mr. Justice Bewley discusses *Ronaldson* v. *La Touche* (24 L. R. Ir. 344), and points out that Mr. Justice O'Hagan in that case said: "There is nothing whatsoever to exclude a person holding under a lease from the definition of a present tenant." Now it is clear from what I have read that both Mr. Justice O'Hagan and Mr. Justice Bewley held, as I hold, that the 8th section of the Act of 1881 is not restricted to tenants from year to year. "There is nothing to prevent its application to a lease if the lessee be a present tenant as defined by the Act." Tenants like M'Carthy were, as it seems to me, excluded from the benefits of the 8th section of the Act of 1881, not because they were leaseholders, but because they were future tenants. Under these circumstances, I do not think the construction given to the 3rd clause of the agreement by Mr. Crean a strange or an unnatural one. I do not say that the meaning of the agreement is clear; indeed,

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The Sub-Commission decided that the tenant was entitled to have a fair rent fixed; and on appeal this view was affirmed by the Land Commission, Mr. Justice Meredith deciding both points in favour of the tenant. The landlord, being dissatisfied, has again appealed, and the case has been very fully discussed before us.

The first point turns on the construction of the agreement. The recital is entirely against the tenant, who has to make out that he is not a future, but a present tenant; but he insists that the true meaning of the third clause of the agreement entitles him to avail himself of the provisions of the Act of 1896, and to have a fair rent fixed. The construction of the clause is by no means simple or clear. Indeed it is difficult and obscure. Does the clause amount to a consent by the landlord that his tenant should be regarded as a present tenant and have the benefit of the clauses of such a subsequent Act as the Irish Land Act of 1896?

It must be borne in mind that the agreement was for a letting at a fixed rent for a fixed period of 21 years. What meaning,

in any point of view, the 3rd clause of the agreement is an obscure one; but having regard to the recital to the effect that Felix M'Carthy proposes to become "a future tenant," and reading that recital in connexion with the 3rd clause and the existing state of the law, I hold that the interpretation placed upon the contract of the parties by Mr. Crean was correct. The 18th section of the Act of 1896 is plainly wide enough to embrace leases as well as yearly tenancies. A very serious question remains. Mr. Fleming, who represented the landlord now before the Court, entered in evidence the will of the grandfather of his client, under which the lands comprised in the agreement of 1886 stood settled. From this will it appears that Francis E. Bennett, the lessor in the agreement of 1886, was only tenant for life with remainder to his first and other sons successively in tail male. The landlord before the Court is the first son of the lessor, and tenant in tail in possession. Mr. Fleming contends that, whatever view the Court may take as to the construction of the 3rd clause of the agreement as between the parties thereto, his client is unaffected because there is nothing in the Act of 1896 authorizing a limited owner to impute a fictitious status to a lessee, or to burden the inheritance with an unreal present tenancy. Mr. Maurice Healy, who argued the case on behalf of the tenant, in reply, contended that section 10 of the Act of 1896 gave full power to a limited owner to convert a future tenancy into a present tenancy, or at least empowered a limited owner to annex to a future tenancy the rights incident to a present tenancy. Now the 10th section provides: "The Land Law Acts shall apply,

then, is to be given to the third clause? To give it the wide meaning, suggested on behalf of the tenant, would make the term of 21 years meaningless, and would contradict the clear recital that he was to be a future tenant. The third clause should not by forced implications be given a strained construction which would contradict or neutralize other express terms of the agreement. It appears to me wiser and safer to adhere to its literal terms and to hold that the tenant was to be entitled "to the benefit of any Act so to be passed." The landlord would thus be showing that he had no desire to contract himself out of any future legislation. It is true that this does not do much, but it rests upon a more solid foundation than a construction which would by implication give the tenant the right of a present tenant, when he had in the very same instrument declared in terms he was to be a future tenant. The point is by no means clear; but after the best consideration I can give the matter, I am unable to concur with Mr. Justice Meredith in his view of the subject.

and be deemed to have always applied, in the cases of tenancies created by a limited owner or by a mortgagor or mortgagee in possession, and the tenancies shall not be or be deemed to have been determined (except in the case of fraud or collusion, or a letting at a gross undervalue) by the cesser of the interest or possession of such limited owner, mortgagor or mortgagee, and the person entitled on such cesser to receive the rent of the holding shall stand in the relation of landlord to the tenant of the holding, and have the rights and be subject to the obligations of landlord accordingly." Mr. Healy contends that the words "The Land Law Acts shall apply and be deemed to have always applied in the cases of tenancies created by a limited owner," and the concluding words of the section, "shall stand in the relation of landlord and be subject to the obligations of landlord accordingly," are conclusive in his favour. In sect. 48, sub-sect. 1 of the Act of 1896 it is enacted that "In this Act unless the context otherwise requires, the expression 'Land Law Acts' means":—[His Lordship read the definition]. That definition does not mention this Act, the Act of 1896. But then comes section 50, sub-sect. 3 of this Act, which says: "Parts 1 and 2 of this Act shall be construed as one with the Land Law Acts, and together with those Acts may be cited as the Land Law Acts, and shall apply to all holdings to which the Land Law Acts, or any of them, as amended by this Act, apply; and section 22 of the Land Law (Ireland) Act, 1881, shall apply as if the said Acts and parts of this Act were part of the foregoing provisions of the said Act of 1881 within the meaning of the said section." Having regard

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The second point relied on by the appellant is much simpler and clearer. The landlord, at the time of the agreement of the 31st August, 1886, was only tenant for life, and had no power to bind the remaindermen by a clause with the construction relied on by the tenant.

The 10th section of the Act of 1896, in my opinion, does not apply and cannot help the tenant. But Mr. Justice Meredith mainly places reliance upon the 18th section of that Act to bind the remaindermen. It is more appropriate to the facts of the case to note the preceding section, the seventeenth, which lays down the conditions under which a present tenancy might be created by agreement between a limited owner and a tenant. It is to my mind impossible to see the necessity of section 17 if the construction sought to be imputed to sections 10 and 18 is correct.

In my opinion the order of the Land Commission is erroneous, and the apppeal should be allowed with costs.

Fitz Gibbon, L.J. :—

I concur. There are two questions, the first of which relates to this case alone, but the second involves a principle which may apply to other cases. First—what is the meaning of the document before

to this definition the question under consideration, as it appears to me, resolves itself into this, is a limited owner "The landlord of a holding" within the meaning of the 18th section of the Act of 1896. In my opinion he is. Section 57 of the Land Act of 1881 defined the word "Landlord" as follows: "Landlord means the immediate landlord or the person for the time being entitled to receive the rents and profits or take possession of the land held by his tenant, and includes the successors in title to a landlord." In other cases I have pointed out that, having regard to the context, the word "landlord" may have a more extended significance than that here conveyed, but this definition is certainly wide enough to include a limited owner. I see nothing in the definitions of landlord and limited owner contained in the 48th section of the Act of 1896 to cut down the *prima facie* meaning of the expression "landlord of a holding" as employed in the 18th section. It is to be observed that the expression "landlord" in section 17 of the Act of 1896 of necessity includes a limited owner, and by virtue of that section a limited owner may, at any time, agree with a tenant to create a present tenancy in the holding. No doubt the section provides safeguards for the remainderman. The section provides that the agreement is to be made in the prescribed manner, and subject to the prescribed rules and conditions in regard to all or any of the matters following,

us, assuming the parties to have had unlimited power over their respective interests in the holding? I agree that it is at best obscure. I intend to base my judgment on the effect of the statutes, but at the same time I think that we ought to give to the document such a construction as will be consistent with the whole of it, and will not nullify or contradict any express words which it contains. Three points are clearly expressed; first, that the tenancy created was a "*future*" tenancy. The parties took this term from the Act of 1881, and, by using it they negatived the intention of attempting to create a present tenancy, or of contracting to confer the rights of a present tenant. Secondly, the amount of the rent was fixed, and any right to apply to fix a fair rent was thereby negatived. Thirdly, the duration of the tenancy was expressly fixed at twenty-one years, and the periodic revision of the rent at the end of fifteen years was thereby negatived. This being the express agreement between the parties, made at a time when judicial tenancies by agreement were actually known to the law, and were defined by the same Act by which the distinction between "present" and "future" tenants was first made, I must read the further clause by which the parties consented that the tenant should have the benefit of future legislation consistently, so far as possible,

and the 4th sub-section of the section provides: "The said conditions shall, in the case of an agreement made by a limited owner or a mortgagor or mortgagee in possession, include such conditions as may be prescribed to protect the interests of the person entitled on the cesser of the interest or possession of such limited owner, mortgagor, or mortgagee." But are there no safeguards in section 10? I think there are. In the case of fraud, or collusion, or letting at a gross undervalue, the tenancy created by the limited owner does not bind the inheritance. Under these circumstances I see no injustice or inconsistency in holding that section 18 of the Act of 1896 applies in the case of a limited as well as in the case of an absolute owner. This being so, it follows from what I have already stated that Felix M'Carthy is within the 18th section. The landlord has consented (as I read the 3rd clause of the agreement of 1886) that the tenant should have the same rights as a present tenant, and the tenancy (the 18th section says) shall be deemed to be a present tenancy accordingly. We therefore confirm the decision of the Sub-Commission on the question of law.

On the question as to the amount of the fair rent, we see no reason to differ from the finding of the Sub-Commission.

W. C. S.

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with the terms already fixed—*i.e.* as being limited to any benefits which future legislation might confer, which should be consistent with the express agreement. If it be said that such a limitation gives the tenant nothing, the answer is that the clause referred to future legislation unknown at the time, that an anticipatory agreement like this must be taken for what it is worth, as applied to the subsequent legislation, and that, if that subsequent legislation does not give any benefit to the tenant unless those which he could take without violating the terms of the agreement itself, we cannot help it. The Act of 1881, section 21, extended the benefits of a present tenancy to certain leaseholders at the expiration of their leases; the Act of 1887 further extended those benefits to certain leaseholders during the currency of their leases; it was quite possible, and was contemplated by the parties, that legislation might have given some such benefits to the tenant under this agreement, in some manner not inconsistent with the express terms of his tenure at a fixed rent for twenty-one years. If this had been done, the clause would have become operative. But we cannot hold that the clause was intended to entitle him to upset the terms of the agreement by coming in as "a present tenant" to fix a fair rent within the twenty-one years. Therefore, on the first question, and on the construction of this document, my opinion is adverse to the tenant.

I now assume that this is a contract to give the *status* of a present tenant, if legislation should render that possible, but still I have to see what the new legislation has done, and whether the tenant can derive any benefit from the contract under that legislation. We cannot confine our attention to section 10 of the Act of 1896; we have also to consider the effect of sections 17 and 18, and the general scope of the Act. Section 17 provides that "The landlord and tenant of any holding may at any time . . . agree, *in the prescribed manner and subject to the prescribed rules and conditions*, in regard to . . . (*d*) the creation of a present tenancy in the holding." The prescribed manner and conditions, in dealing with this case, are all governed by the fact that the landlord who made this agreement was, at the time, a limited owner, and as such he could only bind himself, and his own life-interest, his successor was in no way bound by his contract, nor was the holding bound after his death.

Section 18 says:—"Where prior to the commencement of this Act the landlord of a holding has consented that the tenancy in the holding should be a present tenancy, or that the tenant should have the same rights as a present tenant, the tenancy shall be deemed to be a present tenancy accordingly." This could only be a present tenancy, in the present case, as against the limited owner, unless, under the 17th section, the tenancy was created, or at least agreed to be created, in the manner and subject to the rules and conditions prescribed for the protection of the interests of the persons entitled in remainder. Therefore the most that the Act could do for this tenant would be to give him the benefit of sect. 17, and the agreement is not in the form, nor was it made in the manner, nor does it comply with the conditions, necessary under the Act of 1896 to bind anyone, except the landlord who made it. The tenant cannot get more than what the Act of Parliament gives him. It gives him nothing against those who have come in by a title which is paramount to the power of the contracting party, because the prescribed mode of binding them was not adopted, and the limited owner being now dead, the tenant has no rights against his successors in estate under the agreement in question.

WALKER, L. J.:—

On the first question argued in this case I agree with the construction put upon the agreement of the 31st August, 1886, by Mr. Justice Meredith.

The tenant was not excluded from the benefit of the Act of 1881, because he was a leaseholder, but because he was not only by the terms of the lease, but also by the date of it a future tenant. As the law then stood he could be nothing but a future tenant, and so they express; but I read that third clause as intended to give a benefit, and I read the third clause as saying in effect that if hereafter leaseholders are declared by legislation entitled to have a fair rent fixed, Felix M'Carthy, the lessee under this agreement, shall be placed in the same position as those other leaseholders, and be entitled to have a fair rent fixed. Therefore I look on it as an agreement that he should have the rights of a present tenant. Such an agreement could have no effectual

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operation till the Act of 1896 was passed, but now it seems to me that in some cases such an agreement will come within the very terms of the 18th section. Whether the present case is within the 18th section is the question we have to decide.

But then arises the difficulty that the lessor was only tenant for life, with remainder to his first and other sons in tail, and that the landlord before the Court, Francis Bennett, is the tenant in tail in remainder.

Mr. Justice Meredith, in a very learned judgment, has held that by the joint application of the 10th and 18th sections of the Land Act of 1896 a valid and binding consent exists, that the tenant shall have the rights of a present tenant, and consequently that a fair rent can be fixed against the remainderman. I am not prepared to say that there may not be cases in which "landlord" in the 18th section will include one who is only tenant for life. But I think the special facts of this case took it out of all that controversy.

The will of Francis Bennett, which settled the estate, contains a leasing power to Francis Evans Bennett for 41 years, at the best rent, and the lease of the 31st August, 1886, was for 21 years only. I am not at all sure that the particular clause in question does not offend against the power, and consequently that Francis Bennett, the remainderman, would not be bound by it, but the clause was, irrespective of that consideration, and when the estate of Francis Bennett the inheritor accrued, wholly inoperative against the inheritanee. That estate accrued before the passing of the Land Act of 1896, and Francis Bennett held the estate, unaffected by any such agreement. The tenant for life died on the 28th October, 1888, and for eight years the tenant in tail held, unaffected by it. I can understand the argument on the 18th section, where there is a living tenant for life, who has consented to the existence of a present tenancy.

But how can it be created against the inheritance? Suppose there had been two successive life estates, which had dropped, and the first of the two deceased tenants for life, had entered into such an agreement, would the case be within the section and the remainderman whose right accrued in possession before the Act of 1896 be bound?

So far as regards the 10th section, it is not wanted in the present case for the purpose of holding the lease to be a subsisting one, as it was under a power.

It seems to me that the facts of the present case make it impossible to apply the 17th or 18th sections of the Act of 1896, and accordingly, without expressing any opinion on the general argument of Mr. Justice Meredith, I think that the appeal must be allowed and the originating notice dismissed.

HOLMES, L.J.:—

The more I have considered the third clause of the agreement of the 31st August, 1886, under which the tenant holds, the more difficult does its construction appear to be. The recital that Felix M'Carthy proposes to Francis Evans Bennett to become his *future* tenant, makes it very difficult to hold that the third clause would in any event amount to a consent by the landlord that the tenancy shall be a present tenancy. It does not say so in terms, and an implication to this effect would contradict the recital. It is possible that it may mean that on some event happening the tenant shall have the same rights as a present tenant. But what is the event, and has it happened? The words used to describe it are: "In the event of any Act of Parliament being passed whereby the tenants holding under leases heretofore made shall have extended to them the benefits of the Land Law (Ireland) Act, 1881, or any other Act to be passed dealing with the relationship of landlord and tenant in Ireland." Mr. Justice Meredith has shown that lessees under some leases then existing were present tenants, and that all lessees under leases made before the Act of 1881 would have had the rights of present tenants if it had not been for the provisions of the 21st section of that statute. I confess, however, that this does not give me much help in construing the agreement. At first I was disposed to think that what the parties had in contemplation was a statute that would give leaseholders previously excluded from the right to have a fair rent fixed such right; and that it was intended that if any leaseholders were so benefited, M'Carthy was to enjoy the same advantage.

But it appears to me, on reflection, not only that this would be a very forced construction of the language, but also that it is

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most improbable that parties who had agreed upon an annual rent of £27 10*s.* for 51 acres of land during twenty-one years, intended that this rent might be revised within a year or two. If this is what they were thinking of, why stipulate for a definite term of years at all? The stipulation is that in the event already mentioned, the tenant "shall be entitled to the benefit of any Act so to be passed." The literal meaning of these words is what Mr. Ronan contended for, namely, that the tenant was to have the benefit of any statute that might be passed dealing with leaseholders; and although this construction is open to the objection that the stipulation gives him nothing which he would not otherwise be entitled to, it may be explained by an anxiety to show that he was not contracting himself out of the benefits of future legislation. After careful consideration I have come to the conclusion that, whatever be its meaning, it does not amount to a consent by Francis Evans Bennett, either that the tenancy should be a present tenancy, or that the tenant should have the same rights as a present tenant.

But even if I were to hold otherwise, the second point relied on by the landlord would, in my opinion, be fatal to the tenant's case. Francis Evans Bennett was only tenant for life; and even assuming that he had power to make this twenty-one years' lease, he had certainly no power, at the date of the agreement, to bind the remainderman by such a consent as is suggested. No such power is given by the 10th section of the Act of 1896, which only applies the Land Law Acts to tenancies created by a limited owner, and provides that they shall not be determined by the cesser of his interest in possession. Granting that this made M'Carthy tenant to the remainderman when his estate vested in possession, it did not constitute him a present tenant. It is said, however, that this is done by the 18th section, which, it is argued, has the effect of binding the remainderman by the consent given by the tenant for life. If this result is to be arrived at by the train of metaphysical reasoning applied to the provisions of the Act by Mr. Justice Meredith, it would seem to be a somewhat obscure and complicated method adopted by the Legislature for curtailing the rights of a remainderman recognized by our law for centuries. That the Legislature has not adopted it is, I think,

clearly shown by the section immediately preceding the 17th. This provides for the creation of a present tenancy by agreement between a limited owner and a tenant; but the agreement is to be subject to prescribed rules and conditions, including conditions to protect the interests of the person entitled on the cesser of the interest in possession of such limited owner.

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On both grounds I am of opinion that the appeal ought to be allowed, and the application to fix a fair rent dismissed.

Solicitors for the landlord: *T. R. Wright & Son.*
Solicitor for the tenant: *Maurice Healy.*

R. D. M.

FITZGERALD *v.* RYAN (1).

(1898. No. 11,077.)

Q. B. Div. 1899. Feb. 8, 22.

Appeal. April 18, 19.

Will—Condition, precedent or subsequent—Gift of chattels subject to marriage with consent—Executor, assent.

A testator, by his will, bequeathed his farm and "all stock and chattels thereon" to his son Michael, "provided he marries with the consent of my executors hereinafter named, and gets a substantial fortune with his wife, not less than £250"; and directed that, "in the event of his marrying without such consent," Michael should get one shilling, and that the farm, stock, and chattels should go to testator's other son Patrick. The testator bequeathed to his wife an annuity of £10 for life, charged on "the said farm and stock"; and to his daughters Alice and Johanna £100 each, and to his daughter Mary £50, "said legacies to be paid to each of my said daughters on the marriage of Michael and out of the fortune he receives with his wife, or upon the marriage of each of my said daughters with the consent of my executors." The testator appointed his son Patrick, and another, executors. The testator died in 1893. Michael continued to live on the farm and work it; he never bought stock, but sold stock, and paid the rent. Patrick lived at some distance. He stated in evidence that he used to go from time to time and look after the farm, and see that the rent was paid; that he took no interest while his mother lived, and that she died about 1895. In December, 1897, Patrick obtained probate of the testator's will, leave being reserved to his co-executor to prove.

(1) Before SIR PETER O'BRIEN, L.C.J., and O'BRIEN and ANDREWS, JJ.

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In 1898 a judgment for £65 damages for breach of promise of marriage was obtained against Michael, and, in obedience to a writ of *fi. fa.* thereunder, the sheriff seized four cows, admittedly some of seven cattle which were on the farm when the testator died, and sold them by auction for £31 5*s.* Patrick was present at the auction, and made no objection; but next day objected, on the ground that they were his property.

On interpleader issue, tried before Gibson, J., without a jury, his Lordship held, as a matter of fact, that assent should be presumed from the acts and conduct of the parties, and reported that he regarded the claimant's evidence with distrust; and, being of opinion that the condition was a subsequent one, gave judgment for the execution creditor:—

Held, by the Queen's Bench Division (Sir P. O'Brien, L.C.J., and Andrews, J.; *diss.* O'Brien, J.), that the condition was a condition precedent, and that no interest in the cattle seized vested in Michael until marriage in accordance with the terms of the will, and that the money should be retained in Court until further order to allow of administration proceedings being taken and the rights of all parties protected; and, *held* further, even assuming that the condition was a condition subsequent, and that Michael had a seizable interest in the cattle, the execution creditor could not be held to be entitled to the entire of the proceeds of the sale, but only entitled to be put in the same position as Michael, and that therefore, even so, the money should still be retained in Court in order that it might be ascertained whether, in the course of time, it would cease to be Michael's property.

On appeal to the Court of Appeal, *held* (affirming the judgment of the Divisional Court), that the condition was a condition precedent, but that the money should be paid out of Court to Patrick, the executor.

INTERPLEADER ISSUE.

This was an appeal, by leave, from the judgment of Mr. Justice Gibson upon an interpleader issue, tried before him in December, 1898, without a jury, turning on the construction of the will of a farmer named Peter Ryan, who resided in the county of Limerick.

By his will, which was dated the 10th October, 1883, the testator, Peter Ryan, set out the particulars of the small farm held by him, mentioning the landlord under whom, and the rent at which, he held it, and continued: "I give, devise, and bequeath all my estate and interest in my said farm, and in all stock and chattels thereon, unto my son Michael Ryan, provided he marries with the consent of my executors, hereinafter named, and gets a substantial fortune with his wife, not less than £250; and in the event of his marrying without such consent, I bequeath to him the sum of

one shilling, and leave and bequeath my said farm, stock, and chattels to my son Patrick." The testator then bequeathed an annuity to his wife of £10 a-year for her life charged on "the said farm and stock," and directed that his wife should have the exclusive use of a room in the said dwelling-house and other privileges. The will then continued:—"I bequeath to my daughters Alice and Johanna £100 each, and to my daughter Mary £50, said legacies to be paid to each of my said daughters on the marriage of my son Michael, and out of the fortune he receives with his wife, or upon the marriage of each of my said daughters with the consent of my executors." The will also made provision that in the case of the death of any of the testator's daughters the legacy to such daughter should be divided among the surviving daughters. The testator appointed Patrick Ryan and another executors of his will.

The testator Peter Ryan died in the year 1893. Upon his death Michael Ryan continued to live on the farm and work it; he never bought stock, but sold stock and paid the rent. Patrick Ryan lived some three miles away. He stated at the trial that he used to go from time to time and look after the farm, and see that the rent was paid; that when Peter Ryan died there were seven cattle on the lands; that he "took no interest while his mother lived," and that she died two years after the testator. It appeared that Patrick Ryan had previously been provided for by the testator in his lifetime.

In December, 1897, Patrick Ryan took out probate of the testator's will, leave being reserved in the usual form for the co-executor to prove.

In 1898 an action for breach of promise of marriage was brought against Michael Ryan by one Mary Fitzgerald, a minor, by her father and next friend, which resulted in a judgment for £65 damages. A writ of *fieri facias* was lodged with the sheriff on foot of this judgment, and the sheriff, on the 1st July, 1898, seized four cows on lands belonging to a farmer named Dunn, who lived next Michael Ryan. Michael Ryan admitted to the sheriff at the time of seizure that these cattle were his. They were put up for sale by auction, and realised £31 5*s*. Patrick Ryan was present at the auction, and made no objection. After

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the sale he objected to the girl (Fitzgerald) getting any of the money, but did not say that the cattle were his. On the following day, however, he objected on that ground. The four cattle seized were some of the seven which were on the testator's farm at the date of his death.

Subsequently, Patrick Ryan instituted an action for illegal seizure against the sheriff, who interpleaded, and lodged in Court the amount realized by the sale—£31 5*s*.

At the trial of the issue before Mr. Justice Gibson, counsel for the claimant contended that the condition imposed by the will was a condition precedent, and that the executor had never assented to the bequest. In his report the learned Judge stated that he considered that the condition was a subsequent one, adding that the nature of the bequest and gift seemed to make this construction preferable, while the other view led to an intestacy. He reported that he held, as a matter of fact, that assent should be presumed from the acts and conduct of the parties; that he regarded the evidence of the claimant with distrust; and that, as the facts appeared to him to raise questions of some difficulty, he had allowed the case to stand until the following sittings, in order that, if not settled in the meantime, he might look into the authorities and consider any submitted to him by counsel. Having heard nothing further, he delivered, on the 12th January, 1899, the following judgment:—

Jan. 12.

GIBSON, J.:—

The issue in this case is whether P. Ryan, who is executor of his father's will, is entitled to all or any part of the sum lodged in Court, which represents the price of certain cattle seized and sold under an execution against the defendant.

The executor (plaintiff in the issue) contended, 1, that the condition of the will was a condition precedent, so that the goods never vested in the defendant; and, 2, that he never assented to the bequest.

From the nature of the bequest, which comprises live stock; the frame of the gift over, which is limited to marriage without consent; the fact that, if the consent of the executors was construed to be a condition precedent, there would be an intestacy as to the

farm and stock, at least until marriage, an event which might never happen: I am of opinion that the condition was a condition subsequent. Even if a condition precedent, it ought to be deemed *in terrorem* only, save so far as it was made effectual by the express defeasance. It is not necessary to decide the point; but the cases founded on the civil law are very strong.

I find as a fact that the executor assented to the bequest. The defendant was therefore entitled to the cattle, and the plaintiff in the issue had no interest therein at the time of seizure. On the only two questions argued before me, therefore, the decision must be in favour of the execution creditor.

Assuming that there could be a valid executory limitation over of live stock—a point not argued before me—it occurred to me that there might be some question as to the sheriff's authority to seize a defeasible interest, and I invited counsel's attention to the point. I have since considered Lord Thurlow's remarks in *Foley* v. *Burnell* (1), and the decisions in reference to chattels let on hire mentioned in Dixon on Sheriffs, p. 52. I am not aware of any case upon a contingent executory limitation, where the complete interest, subject to defeasance, is vested in the first taker.

I think that the sheriff was plainly entitled to seize the defeasible interest in the chattels. What was, however, sold was probably the absolute interest, and the money in Court represents probably the entire value of the stock without regard to any contingency. This money would belong to the defendant absolutely if the condition was never violated. What is the effect of the existence of the possible contingency on the rights of the parties?

Assuming the validity of the forfeiture clause, the legatee in possession of the live stock, which were perishable chattels, was by necessary implication authorised to deal with the cattle and sell them in due course. He was not bound to keep them in specie, or to maintain the herd by breeding. His rights cannot depend on the sex of the stock, which, if bullocks, could not breed. He was not obliged to keep the cattle till they died. They are to be used for profit. But, should the contingency of forfeiture occur, he is

(1) 1 Bro. C. C. 274.

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liable to account. Unless and until that event happens, which may be never, he may deal with the stock and apply the proceeds. How could the Court interfere with his action? Suppose he sold, how could his application of the proceeds be controlled? Might he not give up farming, and realize the stock? The will creates no trust.

It may be said that possibly the Court might make an order directing the proceeds to be invested and the dividends paid to the execution creditor during the life of the debtor, or until forfeiture, with liberty to apply for payment of the principal when it was ascertained that forfeiture had become impossible. But this would be a novel case in interpleader, where the only question raised and discussed was the direct and immediate title of the plaintiff. It would not appreciably benefit the plaintiff, as, in any event, he must pay the costs, having completely failed on the points of law and fact he came into Court upon. It is obvious that no such order could be made impounding the proceeds if the gift over was inoperative.

Considering the nature of the interpleader issue, and the actual controversy between the parties, and that the plaintiff had no right to interfere with the defendant's possession and control of the stock, if there had been no execution, I must decline to make any special order impounding the principal. It may be that the execution creditor and judgment debtor are personally liable to make good the value, should it be hereafter held that the limitation over of the cattle was valid, and should a marriage without consent take place. The validity of an executory limitation of living animals attached to a previous absolute gift was not discussed by counsel. It is manifest that the specific cattle, the subject of the gift, having regard to the average duration of animal life, might be dead long before the forfeiture would accrue. The testator created no trust. Suppose the testator, having strong vegetarian views, suffered the stock to be taken off by old age, would he be liable? The gift over is not circumscribed by any limit of time.

Without deciding this point, I am of opinion that, upon the issue that the parties came to try, the plaintiff is in the wrong; but, to protect the plaintiff, I shall recite in the order that the

Court expressed no opinion as to the plaintiff's right (if any) against the judgment debtor, or execution creditor, in the event of the judgment debtor marrying without the consent in the will of Peter Ryan mentioned.

The claimant, pursuant to leave, now applied to the Divisional Court for an order that the judgment entered for the execution creditor be set aside, and judgment entered for the claimant (Patrick Ryan) with costs, or for a new trial, on the grounds—(*a*) that under the will of Peter Ryan, deceased, the cattle so seized did not vest in Michael Ryan in the events which happened, and that the learned Judge should have so held; (*b*) that the said cattle were not in law capable of being seized under a writ of *fi. fa.* against the said Michael Ryan, and that the Judge should have so held; (*c*) that, in the events which happened, the said cattle remained unadministered assets of the said Peter Ryan, deceased; (*d*) that the money realized by the sale of said cattle was bound by the trusts of the will of the said Peter Ryan, and should not be handed over to the defendant; and (*e*) that no assent of the executor (*sic*) of the said Peter Ryan was ever given to the vesting of any legacy in the said Michael Ryan.

C. Doyle, for the claimant.

D. F. Browne, for the execution creditor.

Cur adv. vult.

ANDREWS, J.:—

Feb. 22.

This was an interpleader issue, tried before Mr. Justice Gibson last December, which came again before him upon making up his order in January last. The claimant in the issue was Patrick Ryan, son of the testator Peter Ryan, whose will I shall have to refer to. The execution creditor, Mary Fitzgerald, had obtained judgment against Michael Ryan, another son of the testator, and a legatee and devisee under his will. The learned Judge tried the case without a jury, and made the order which is now before this Court on appeal.

It is necessary to refer to this order, which recites an order, dated the 7th September, 1898, made in the action of Mary Fitz-

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gerald, by William Fitzgerald her father and next friend, against Michael Ryan, by which it was directed that an issue should be tried before a Judge without a jury, between the claimant Patrick Ryan and Mary Fitzgerald by her father and next friend, and that the issue came on for trial on the 15th December, 1898, and by adjournment on the 12th January, 1899, counsel and solicitors appearing on both sides. The order then proceeds as follows:—"Whereupon the Judge found that the said Patrick Ryan is not entitled to the sum of £31 5*s.*, the amount realised by the sheriff of the county of Limerick under the writ of *fi. fa.* in the said action, ... and the Judge accordingly gave judgment for the said Mary Fitzgerald with costs, and the sheriff of the county of Limerick having sold the goods and chattels, and having lodged in Court the amount realised, viz. £31 5*s.*, it is ordered by the Judge that out of the said sum of £31 5*s.* lodged in Court by the said sheriff the sum of £10 12*s.* 7*d.* be paid out of Court to the said sheriff, and that the balance remaining, viz. £20 12*s.* 5*d.*, be paid out of Court to the said Mary Fitzgerald, and that the said claimant Patrick Ryan do pay to the said Mary Fitzgerald the costs of and incidental to the interpleader order and issue, and also the sum of £3 3*s.*, the said sheriff's costs of the motion, dated the 7th September, 1898, and also the sum of £7 9*s.* 7*d.*, the said sheriff's expenses of seizure and sale."

The Judge gave leave to appeal, and stayed execution and payment out under this order until the appeal should be disposed of.

Thus the order disposed of the entire case; and the effect of the order, put shortly, is a decision by the Judge that the sheriff was entitled to seize the cattle and sell them—that the purchaser was entitled to take them absolutely—and that the proceeds of the sale were properly payable to the execution creditor of Michael Ryan.

The question in the case almost entirely depends upon the true construction of the will of Peter Ryan, deceased, which bears date the 10th October, 1882. In that will the testator sets out the particulars of the small farm held by him, and he continues thus:—"I give, devise, and bequeath all my estate and interest in my said farm and in all stock and chattels thereon unto my son.

Michael Ryan, provided he marries with the consent of my executors, hereinafter named, and gets a substantial fortune with his wife not less than £250; and in the event of his marrying without such consent, I bequeath to him the sum of one shilling, and leave and bequeath my said farm stock and chattels to my son Patrick." The testator then proceeds to give to his wife an annuity of ten pounds a year for her life charged on "the said farm and stock," and directs that his wife shall have the exclusive use of a room in the said dwelling-house, and other privileges. He then makes provision for his daughters; and I refer to this portion of the will because it has reference to the condition imposed upon Michael, and to the amount which it was intended that he should bring in upon his marriage, viz. "I bequeath to my daughters Alice and Johanna one hundred pounds each, and to my daughter Mary £50, said legacies to be paid to each of my said daughters on the marriage of my son Michael and out of the fortune he receives with his wife, or upon the marriage of each of my said daughters with the consent of my executors." It will be seen that these legacies make up the minimum amount of the fortune which the testator intended that his son Michael should obtain on his marriage; and it is evident that it was to this event that the testator was looking to provide means to pay his daughter's legacies. The will also makes provision in case of the death of any of his said daughters, that the legacy to such daughter should then be divided between the surviving daughters; but to this it is unnecessary to refer more particularly.

The question argued before us was whether the proviso annexed to the gift to Michael Ryan was a condition precedent, until performance of which nothing vested in him; and, since the argument, the further question has been considered by the members of the Court whether, even if not a condition precedent, any portion of the subject-matter of the gift was capable of being seized and sold by the sheriff, and transferred by him on the sale to a purchaser absolutely.

I shall deal first with the question whether this was a condition precedent. If it be, there is an end of the case; for, then, there would be nothing which the sheriff could seize as property available to satisfy the claim of the execution creditor against Michael

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Ryan. It has been said by eminent writers upon the law of wills, that the question whether a condition is a condition precedent (in which case the interest does not vest until performance) or a condition subsequent (in which case an interest already vested is determined by non-performance), is one upon which general propositions can scarcely be laid down that will afford any great assistance; and, further, that the question must depend on the language in which the will is framed, and that very little help can be derived from decided cases. Almost every will in which such a condition occurs is peculiar in its language, and for this reason it is almost impossible to find a decided case so identical with the case under consideration that a decision upon the one can be taken as an authority upon the other. We must, therefore, carefully read the will, and, construing it as a whole, endeavour to ascertain what the testator must be taken to have meant by the language he has used. Some propositions have been laid down which may to a certain extent assist in arriving at a conclusion on this question. It has been said that where the condition requires something to be done which will take time, the argument is in favour of construing it as a condition subsequent; while, on the other hand, a condition which involves anything in the nature of consideration is in general a condition precedent: Theobald on Wills (ed. 1876), p. 263. In *Acherley* v. *Vernon* (1), Chief Justice Willes says that, if a man devised one thing in lieu or consideration of another, or agreed to do anything or pay a sum of money in conderation of a thing to be done, in these cases that which was the consideration was looked upon as a condition precedent; and, with reference to the lapse of time which might occur before the condition was performed, I may refer to *Randall* v. *Payne* (2) in which the facts were shortly these:—A testator after giving legacies to J. and M. added, "If either of these girls should marry into the family of G. or R. and have a son, I give all my estate to him for life" (with remainders over), and if they should not so marry, then, the testator gave his estate to other persons. The question was raised before Lord Thurlow, what was the true construction of that clause? whether that was a condition precedent, so that there

(1) Willes, 153.

(2) 1 Br. C. C. 55.

was no vesting until the event happened, or whether it was to be taken as a condition subsequent. Lord Thurlow held this to be a condition precedent, and that nothing vested in the devisees over while the fulfilment of the condition by J. or M. was possible; and it will be observed that, in that case, Lord Thurlow was not deterred from holding it to be a condition precedent by the consideration that such a lapse of time as the lifetime of these ladies might intervene; for, during that period it was possible for them to marry so as to perform the condition, and only upon their death could it be ascertained that the gift over should take effect.

In the second volume of Jarman on Wills a number of cases are cited, some of which show that certain words have been held to be conditions precedent, and certain other words conditions subsequent. No doubt these various cases would necessarily produce much difficulty if the Court, in seeking to construe a particular will, were to attempt to reconcile them with one another; but the learned author (and it is for this reason that I refer to the passage) regards the various cases as appearing to show that the argument in favour of a condition being precedent is stronger where the nature of the interest is such as to allow time for the performance of the act before enjoyment, citing *Acherley* v. *Vernon* (1), and stronger where the condition is capable of being performed instanter, than where time is requisite for the performance, citing *Gulliver* d. *Corrie* v. *Ashby* (2).

It may very well be said that all these propositions and cases still bring us back to that to which we must in the end come, viz. the consideration of the language of the particular will; and, in this case I have come to the conclusion, after full consideration, and I am bound to say without any more doubt than is produced in my mind by the circumstance that my view is not shared by Mr. Justice O'Brien, that this is a condition precedent.

The testator deals with Michael Ryan as a person who is to bring in something, to procure a sum of money which was to be applied in carrying out the testator's intentions; and this fund the devisee was to get in a prescribed way before he obtained the benefits which the will gave him. It was also the obvious inten-

(1) Willes, 153. (2) 4 Burr. 1940.

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tion of the testator that the fortune which Michael was to get upon marriage was to constitute an available fund for the discharge of the legacies to his three sisters. The procuring of this fund appears to me to have been clearly made one of the terms upon which he was to take the benefits of the gift in his favour; and, until he had performed this condition, it also appears to me to be clear that the testator would not have regarded him as having, if I may so express it, *purchased* the benefits of the gift he made to him.

But the will goes on also to give expression to the testator's intention in the event of one of the conditions not being performed—there being, it will be remembered, a double condition—that not only should Michael marry with consent, but also that he should get a fortune of £250. Without speculating whether the following clause includes the £250, or not, it provides that "in the event of his marrying without such consent," the testator bequeaths to him the sum of one shilling, and leaves and bequeaths his "said farm stock and chattels" to his son Patrick. Therefore, it seems to me that the testator has intimated that, in the event of Michael complying with the terms imposed upon him, he is to get the farm stock and chattels, subject to the annuity to the widow and to the legacies to the daughters; but that, if Michael does not not comply with the first part of the condition, he is only to get one shilling. If the condition be a condition subsequent, Michael Ryan would have his life to perform it, and this, it seems to me, would lead to the curious result that Michael would get a life estate at least in the whole of the testator's property, of which the testator intended he should not get more than one shilling, until performance of the condition. I think that the intention of the testator is, upon the face of the will, sufficiently clear to support the view that this was a condition precedent.

But it is said that there are objections to this view. One of these objections, which was advanced by Mr. Justice Gibson, is that part of the property is perishable in its nature, that cattle cannot be regarded as living for ever, and that they might be of a kind incapable of reproduction by themselves; and that, for this reason, the testator must be regarded, in dealing with them, as giving to Michael Ryan complete control over the stock, and that

it would be inconvenient to hold otherwise. As to this, I see no difficulty. The Court, in administering the trusts of the will, could direct that any perishable property be sold, and that the proceeds be retained so as to prevent loss by waste or death, until it should be ultimately ascertained who is entitled to the estate.

There is also another view, referred to by Mr. Justice Gibson, and relied upon in the argument before us, which is, of course, entitled to consideration, viz., that the construction holding the proviso to be a condition precedent would leave the interest in the property undisposed of in the interim, and that this result of a partial intestacy is one which the Courts do not favour. I am bound to say that, though such a partial intestacy may result, it does not enable me to disregard the clear expression of intention which produces it; and, in the present case, no great calamity can arise from this, whether the testator contemplated it or not; for the persons who would benefit from this partial intestacy would be his wife, sons, and daughters; and the property would not pass into the hands of strangers. The four cattle sold, which produced the £31 5*s.*, were four of the very stock on the farm referred to in the will. What is true in reference to these four cattle must be equally true as regards the entire of the gift, by which the testator practically disposed of the whole of his property; for the gift was of all his interest in his farm "and in all stock and chattels thereon," subject to the conditions; and it appears to me that if the will is to be so construed, as contended for by the execution creditor, it is open to Michael in the interval, and before the conditions have been performed to, in effect, deal, not only with the stock, but with the farm, by making the whole subject of the gift liable to make good any debts contracted by him. But can it be said that the testator contemplated the possibility of Michael not doing anything towards a performance of the conditions imposed on him, and at the same time placing him in a position to be able to incur debts capable of being liquidated out of the subject of the gift.

Upon these grounds I am of opinion that the true construction of the will is the construction which forbids such a result, and that the order which we should make ought to be to reverse the order of the learned Judge at the trial.

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The proceeds of the sale of the stock, £31 5*s.*, are lodged in Court, and are under the control of the Court, and it may be the proper course that this fund should be transferred to some suit or proceeding in which the estate of the testator can be administered, and the rights of all parties protected. Accordingly, I think that this sum should be retained in Court until further order. If the parties are inclined to have the will construed and carried into execution as a whole in the Chancery Division, the amount can be transferred to the credit of that suit by a subsequent order; but at present it seems better not to make any more special order respecting it. It certainly cannot be paid out to the execution creditor, Mary Fitzgerald; and as she, having regard to the views taken by the majority of the Court, must fail, whatever the construction of this will is, she or her next friend must bear the costs of these proceedings, which include the costs and expenses of the sheriff, the costs of the trial, and of this motion.

Assuming now that my construction of the will is erroneous, and that the condition in question is a condition subsequent, and that the property is now vested in Michael Ryan, subject to be divested, and that he has an interest in it available for payment of his debts, still I think it would not be competent to the sheriff to sell the cattle out and out, and hand over to the purchaser the absolute property in them, and pay over the proceeds to the execution creditor; for that would put it out of the power of the person who might afterwards become entitled under the gift over in this will to have the enjoyment of what the testator obviously intended to give to him; while Michael, to whom the testator in that event had only intended to give one shilling, would have had the benefit of the full value of the stock. The most that the sheriff could do, even assuming that Michael Ryan had a seizable interest in the cattle, would be to put the purchaser in the same position as that in which Michael Ryan stood, and transfer to him the interest which Michael Ryan had; but this would not entitle the sheriff to hand over the entire of the proceeds of the absolute sale to the execution creditor or the cattle themselves to the purchaser. An analogy may, perhaps, be found in the law of partnership, where, if there is a judgment against one of two partners, and a writ of *fieri facias* on foot of that judgment, there is a seizable

and saleable interest in such partner for the purpose of liquidating his debts; but the sheriff is not entitled to take possession of the partnership goods or transfer them to the purchaser, and is only entitled to put the purchaser in the same position as the debtor, and to make him a tenant in common with the other partner.

Therefore, even if this were a condition subsequent, I am of opinion that effect could not be given to the view contended for on behalf of the execution creditor, and that the money must still be retained in Court in order that it may be ascertained whether in the course of time it would cease to be the property of Michael Ryan.

O'BRIEN, J.:—

On an interpleader issue, as to whose was the property in certain cattle, the principal question is whether a condition was precedent or subsequent, so as to make the property liable or not liable to execution. A farmer, having two sons and several daughters, bequeathed his land held from year to year, with the stock, to one of the sons, provided he married with the consent of the executors and got a substantial fortune, not less than £250; and, in the event of his marrying without the consent of the executors, he bequeathed to him the sum of one shilling, and left the land to his second son, no condition being attached in his case, and the part of the condition as to the fortune being dropped in the latter limitation, though it would not, perhaps, be a very much strained construction to hold that the consent of the executors was to include the fortune, as they were likely to be indifferent to the person. He then gave sums, corresponding in amount with the fortune stated, to the daughters, and directed that they should be paid on the son's marriage or on their own marriage, and appointed executors. Any one knowing anything of the ordinary mode of provision for family made by persons of that class, would have no doubt as to a construction of the will which would reconcile all interests, by holding that the condition as to marriage and the fortune was subsequent, while the difficulties in the way of holding the condition to be precedent are unnatural, if not insuperable. The farm and stock are the fund out of which the whole family are to be provided for. The son, or one of the sons,

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gets the land. That is the disposition which nature points out, and is never departed from. By the land he gets a wife, and the fortune goes to the younger children. Money, of course, there is none, until it comes in that way, and there was none in this instance. Michael, the devisee, against whom the execution was issued, is still unmarried. It is conceded, or must be, that he has his whole life to fulfil the condition, if it be a condition precedent. In the spirit, perhaps, of filial obedience, he made an imperfect essay to fulfil it, which resulted in an action for breach of promise, with the consequence of the goods being taken in execution.

Meanwhile, it is urged, during his inertness, the sisters would be unprovided for. But that is a thing ordinary in the understanding of persons of the testator's class, who never contemplate any provision for the females of the family until the son gets married, and the natural occasion arises for their leaving the house, and taking the means provided for them through means of the marriage, and leaving the husband and wife in exclusive possession of what she has bargained for. Until the event happens it never occurs to the mind of a farmer that his daughters are unprovided for, while they are living with an unmarried brother. They keep his house, and they want no means of maintenance. It is true that they are to receive the sums of money mentioned on his marriage or on their marriage, which last alternative is capable of being satisfied by attributing it to marriage after the son's marriage. Without and until that event there is no money to pay them. They have no charge upon the property, and the specific gift exhausts the means of paying the legacies. There might, no doubt, be supposed to be other assets out of which the legacies would be capable of being satisfied on their own marriage, without awaiting the event of the son's marriage; but in that case there would be no sense in naming the son's marriage as an alternative time of payment. Now, let us look at the consequences if the condition were held to be precedent. First of all there would be an intestacy until the condition was fulfilled, and the presumption of the law against intestacy is not answered by the fact that the interest in the meantime would vest in the executors, for the property always devolves to some one during intestacy. The principle does not rest on the vacancy of estate, but on the ground

that a person has not done what he is professedly engaged in doing—disposing of his property by will. There is no gift to the executors, nor the smallest indication that they were to do anything. Executors, of course, with a farmer's family all living, never go near the place. Next, the mother gets £10 a-year charged upon the land, with certain apartments, which is the strongest proof that the daughters were not intended to have any specific right against the land, but also that it was the intention of the testator to remove all obstacles to the immediate possession of the son, in displacing the widow from her usual position of guardian of the property and family. Again, the son must have the land and stock in order to buy the wife and fortune. For though it is not impossible in law that the marriage and the vesting should take place at the same time, which happens necessarily where the father assigns to the son on marriage—because there the interest passes without any interval—no one in the testator's position would think of the vesting being suspended by a condition precedent where there was not a precedent interest. Moreover, there is no time specified for the performance of the condition; and there must be some time for a marriage. There might be facilities enough for obtaining a wife, but there might not be the same facility as to £250. And, notwithstanding the hasty diplomacy which attends such occasions in the farming class, the rent would have to be paid, and the land tilled, and the cattle fed; and there must be a person to pay the £10 a-year to the widow, and to occupy the rest of the house, while the wooing was delayed. All these things are not inconsistent, no doubt, with there being a continuing possession without actual title; but that is a distinction that would not be likely to be in the mind of the testator. If he meant to keep a firm hold of the land, so that there should be no right whatever until the marriage and fortune, it is inconceivable that some authority or control should not be given either to the executors or the widow. He thought, no doubt, that there would be sufficient security for the other children if the estate of Michael were liable to be defeated afterwards for breach of the condition, or by the application of the £250, which would be charged with the payments to the other children, and would constitute a personal debt of Michael. The contingency of his not marrying, which

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would enter into the distinction between a condition precedent and a condition subsequent, plainly did not occur to his mind. Moreover, the gift to Patrick, the other son, is made to take effect, not on the non-performance of the condition, but on the violation of it—not neglect to marry, but actual marriage without consent—which has not happened. Michael is still unmarried, and on any construction of the condition, has all his life to make up his mind. So that, upon the construction of a condition precedent, there would, in the first place, be an intestacy during his life, and the legal right would not be in anyone. But the inconvenience does not stop there at all, for, in the next place, there would be a total intestacy. For Michael is only to take after the actual event of a marriage without consent, and on the death of Michael that would become impossible. Therefore, the whole will would be defeated.

What was present to the mind of the testator? Was it one condition or two conditions? Was it a condition precedent that Michael should marry, and, until that happened, the lands should not vest? And was there another condition also present to his mind, that, if he married without consent, Patrick should have the lands and stock; that there should be two independent conditions having a distinct operation upon the lands—that Michael should take nothing until he was married, and that Patrick should not take unless Michael was married without consent—the condition of the limitation to the latter not determining the possession, which still could not be taken during Michael's life if he remained unmarried or afterwards. Is it not the true construction, on the other hand, that there was but one condition in the mind of the testator—the condition subsequent, by which the estate would be divested and pass over to Patrick if Michael married without consent—a condition which would leave no vacancy in the right, which is what the rule of law favours, that one was to come in when the other was to go out, and not that Patrick was to come in when Michael had not gone out, but in reality had never come in at all. The true construction of the will, according to my view, is that the disposition is to be read as if there were but a single clause: that if Michael married without consent Patrick was to have the lands, and that the earlier clause is merely the statement

in another place of the same event, in which the land was to go to the brother in what was the natural course, the immediate succession of one to the other. What is the arrangement of the will that must be contended for if there were not successive dispositions, one taking the place of the other. It must be that they were all alternative, one taking the place of the other. But how can they be alternative when they could not occur at the same time? Did the testator say, "I will give the lands to one son if he marries and gets a fortune, and if he does not marry and get a fortune I will give it to another son"? Not at all. These are not the words or the effect of them. But he gives it to one, provided he *marries with consent* and gets a fortune, and to the other in case the first *marries without consent*. In truth, the testator was not thinking of the marriage at all, but of the provision for the other children; while the marriage was to be the means of obtaining the fortune, and therefore the will is to be read as if the words were—"And if my son, upon his marriage, does not obtain the consent of the executors and a fortune," which brings it to the case of a single condition, and a condition subsequent.

It is agreed in all the cases that the words which introduce the clause have no effect upon the distinction between a condition precedent and a condition subsequent, and accordingly the word "provided," which occurs in cases decided to be instances of conditions subsequent, has no influence on the construction. It is also laid down that there must be a time certain for the act which constitutes the condition, or that it must be capable of being performed immediately. "Instantly" was the term used in the judgment of Lord Mansfield in the case of *Gulliver* v. *Ashby* (1). That was a case where the condition was taking the arms and name of the testator, which was held to be a condition subsequent, because there were certain preliminaries for the performance of it that required time. Here the condition was a marriage, not with a particular person, but with a person to be found, and in the possession of a fortune; and the act was not dependent upon the devisee alone, but required the concurrence of another person, which makes a further distinction. Of course, the testator looked

(1) 4 Burr. 1940.

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to his son's marrying in the ordinary course of nature, and to the possession of the land and stock as the means of a marriage, and to his being willing to relieve himself of the burden of maintaining the rest of the family, if not to their own willingness to be provided for, and to "reprove his dull delay," and did not think it necessary to provide for the fact of his marriage for itself. He did not contemplate the improbable and unforeseen; but, like all testators, he must be taken to have known the legal consequences of his dispositions.

There are two cases which have been referred to in argument which appear to be very precise upon this question. One is *Peyton* v. *Bury* (1), of which a short account is to be found in the marginal note—"One devises the residue of the personal estate to J. S., provided she marries with the consent of his two executors; on the death of one, the condition (being a subsequent one) is become impossible, and she may marry without the consent of the survivor." The Master of the Rolls (Sir Joseph Jekyll) there says, "It is very clear that the plaintiff, the devisee over, has no title to the residuum: first, in the nature of the thing, and according to the intention of the testator, this could not be a condition precedent, for at that rate the right to the residuum might not have vested in any person whatever for twenty or thirty years after the testator's death; since both the executors might have lived, and Jane Styles continued so long unmarried, during all which time the right to the residuum could not be said to be in the executors, they being expressly mentioned to be but executors in trust."

The condition was there expressly determined to be a subsequent one, and that case is referred to and reviewed by so great an authority as Grant, M.R., in *Knight* v. *Cameron* (2), in which that eminent Judge said—"The case of *Peyton* v. *Bury* (1), at the outset, appears the same; but there are subsequent words, that, if the legatee should marry otherwise, the legacy should go over to another. That shows a condition subsequent, not precedent, was intended, as, upon her marrying without consent, it was to go over."

(1) 2 P. W. 626 (1731). (2) 14 Ves. 389 (1807).

Reasonable time is clearly out of the question, as no tribunal has yet taken upon it to enter into a matter of such caprice and latitude, and which admits every degree and opinion of unreasonableness. Marriage, as an occasion for the payment of money or vesting of an estate, in the case of a woman, is a thing quite distinct from the case of a man. The marriage of the son had no reference to any object of time or convenience which would assist the construction of a condition precedent, but was looked upon merely as the means of producing the money for the other members of the family. The son, with the land, was put upon the market, and there were no buyers.

I am therefore of opinion that the Judge was right in the direction he gave that the verdict ought to stand. The view that it occurs to me to take of the construction of the will removes any apprehension of a conflict with what appears to have been a judgment of the County Court, not appealed from, between parties in the same privity, which must have involved the determination that there was no existing right to the property against Michael (1). The judgment directed for the execution creditor, in my opinion, was right, and he is entitled to the proceeds of the sale.

SIR P. O'BRIEN, L.C.J.:—

I concur in the result arrived at by my brother Andrews. I rest my judgment upon the words of the will; and I do not feel myself justified in ignoring the language the testator has used, because unexpected results may follow from his son Michael not having chosen to act as his father plainly contemplated he would act, from not having fulfilled the condition imposed by the will, namely, having married with the consent and to a girl with the

(1) It was stated during the argument that in April, 1898, an equity civil bill for administration was brought by two of the daughters of the testator against Patrick Ryan (as executor) and Michael Ryan, as defendants; that Patrick Ryan did not appear or defend; that Michael Ryan entered a defence; and that, after hearing evidence, the civil bill was dismissed by the County Court Judge (His Honour Judge Adams) on the ground that the estate had been fully administered. Some compromise of their claims was subsequently effected between Michael Ryan and the plaintiffs, his sisters. No appeal was taken by Patrick Ryan from the order of dismissal.—[REP.]

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fortune therein specified. It appears to me that judgments which have been sometimes delivered on the construction of wills are only the emanations of the ingenious who deftly set aside the plain obvious meaning of the language of a testator and ascribe to it an effect which its plain sense cannot bear, in order to escape from the embarrassing results of a contingency which the testator did not provide for. They not only do violence to the language used, but practically ignore it, in order to make a testator provide for every posthumous contingency. This mode of construction affords a wide field for the exercise of ingenuity. It is interesting, because ingenious; the developments of an artistic ingenuity are indeed always interesting, but are often very misleading. Grammar and its trite rules, words and their common-place ordinary signification may not appeal to the artistic; but they appear to me to be safer guides in the construction of wills.

Having said so much by way of preface, I now turn to the will of the late Peter Ryan, who was a farmer resident in the county of Limerick, possessed of some twenty acres of land with some stock thereon, viz. seven cows, a heifer, and a horse. Before I advert to the language of his will, I shall endeavour to find an arm-chair in his house that I may sit upon it, and look round upon the conditions of his family, and the habits of the social life of his class. I find that this small farmer had no arm-chair; but the rude seat upon which he sat will suffice. It will enable me to take the necessary survey. He was a plain man; I dare say educated at a National school, blunt and brusque, but by no means ingenious. He knew nothing about Roman law and its cases. He had a wife; two sons, Michael who was the youngest, and, as I understand, of a marriageable time of life, and Patrick; he had three daughters. This was his family. His assets were as I have indicated. Now, what are the habits of his class as regards marriage, and marriage agreements? Of course we can have regard to what is very common knowledge on this subject. We must indeed be presumed to know something of the general habits of the great body of the people in this country, in respect of whom we are commissioned to administer justice. What almost invariably takes place on the marriage of the son is this:—Provision is made that he should get the land, but that he should secure a

sufficient fortune to provide for his sisters. The thing is never left to chance; if the son gets the land, as a condition of his getting it, a fortune must be got to be applied for the benefit of his sisters. Generally a room and the milk of a cow or some small annuity is reserved for the widow; but there is invariably the condition of the gift that a fortune is paid down to the son to be applied for the benefit of the daughters.

Now, having seen the testator, and having taken a survey of his family, his assets, and the habits of his social life, so far as they are pertinent, I come to the language of the will; and, as there are no terms of art in it, I ask that embodiment of common sense and common knowledge, "the man in the street," to read it. "I give, devise, and bequeath all my estate and interest in said farm and in all stock and chattels thereon unto my son Michael Ryan, provided he marries with the consent of my executors hereinafter named, and gets a substantial fortune with his wife." "The man in the street" would, I venture to say, have no difficulty whatever about this. As plainly as the English language can make it, it is a condition precedent. What way is it attempted to be read? This way, "I give my farm, &c., so that it will vest in my son Michael on my death whether he marries or not, or whether he marries with the consent of my executor or not, or whether he gets a fortune or not." This is not merely doing violence to the language of the will; it is not merely ignoring the language of the will; it is making the testator say the very contrary of what he did say. But, take the subsequent clause:—"And in the event of his marrying without such consent I bequeath to him the sum of one shilling, and leave and bequeath my said farm and stock and chattels to my son Patrick," that is to say, if he does not fulfil the condition—if he does not abide by the social habits of his class—and get for his sisters the money down, he is never to touch the farm. The measure of his bounty in the one event is the farm and the stock; the measure of his bounty in the other event one shilling. According to the construction contended for on behalf of the execution creditor, the farm would vest in him on the death of the testator. Though he got nothing for the sisters, he would have an opportunity of wreaking his wicked will on it, of wasting and consuming

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the assets, and of reducing it to such a condition that would preclude his getting the prescribed fortune. The whole scope and intention of the will would be defeated. The intention and object of the testator was to make the son lose no time about marrying according to the conditions, and in fact to make him and the executor do what is always done in their class of life, namely, go into the marriage market and pick out a good girl with the necessary fortune. This is looked upon by people in the testator's class as a thing capable of almost immediate accomplishment. Sentiment, good looks, attractiveness, are put aside; this causes no delay; previous acquaintance is not even required. The supply in the rural marriage market is looked at, and a virtuous girl with the requisite fortune easily selected; and I am quite sure that the father well knew what, having regard to the farm, was a reasonable sum to fix for a fortune. The father never contemplated that there should be any delay in the son getting married. Old bachelorhood was never contemplated. I have known old bachelors with whom I would like to spend many an hour myself, so great was their social charm; but this rural farmer never contemplated that his son would remain in this isolated condition; and indeed I feel quite certain that the testator intended that the ordinary recourse to marriage was assured and hastened by the provision as to the son Patrick taking the property; and, as I have referred to the event in which Patrick is to take, I would wish to point out the language used. He does not say that Michael is to *forfeit* the interests under the will. He uses no language to point that the estate is to pass from Michael to Patrick. He merely says that if Michael does not comply with the conditions he is to take but a shilling; and that Patrick is to take the property. There is, so to speak, no divesting language. What the testator's object was, was not restraint of marriage, but incentive to marriage. Michael's marriage upon the prescribed conditions was regarded as assured, and the testator may naturally not have been very exhaustive in regard to what would happen in the event of Patrick getting the estate. But I cannot set aside the plain language of this farmer's will, because as a whole it is not artistically exhaustive in dealing with posthumous contingencies. I am much afraid that considerations of partial intestacies, not contemplated by the testator, but

discovered by subtle lawyers, have been principal sinners in defeating the intentions of testators. *Q. B. Div.* 1899. FITZGERALD v. RYAN. Sir P. O'Brien, L.C.J.

Considerations as to conditions not being capable of immediate fulfilment and of partial intestacy must no doubt be regarded. This is the veriest common-place of the text-books; but such considerations can never override the obvious meaning of plain language. I am clearly of opinion that the condition of the will was a condition precedent; but, were it a condition subsequent, I am of opinion, for the reasons assigned by my brother Andrews, that the sheriff could not seize and sell as he did.

It was ordered accordingly:—

"THAT the finding of the Right Honorable Mr. Justice Gibson, and the judgment and order pronounced by him on the 12th day of January, 1899, on the interpleader issue, be set aside; and it is declared and adjudged that the said Mary Fitzgerald is not entitled to be paid the sum of £31 5*s.*, now in Court, or any part thereof, and that the said sum be retained in Court until further order, and that William Fitzgerald, as next friend of the said Mary Fitzgerald, the execution creditor, do pay to the sheriff the sum of £10 12*s.* 7*d.* mentioned in the said order of the 12th of January, 1899, and do also pay to Patrick Ryan, the plaintiff in the issue and the executor of the will of Peter Ryan, deceased, his costs of said [interpleader] order, dated the 7th of September, 1898, and of the trial of the said issue, and of the argument on this motion. And it is further ordered that the said Mary Fitzgerald, by her next friend, be at liberty to appeal against this order within fourteen days from this day, as she may be advised, and that liberty be reserved to the said Patrick Ryan to apply in relation to the said sum of £31 5*s.*, or otherwise in relation to the premises, as he may be advised."

A. E. R. J.

Appeal. April 18, 19.

The execution creditor appealed to the Court of Appeal (Lord Ashbourne, C., FitzGibbon, Walker, and Holmes, L.JJ.).

D. F. Browne, for the appellant.

C. F. Doyle, for the respondent.

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April 19.

LORD ASHBOURNE, C. :—

The question is, Whether the condition as to marriage attached by the testator to the gift of the farm to his son Michael is a condition precedent or a condition subsequent? From the frame of the will one clearly sees an intention in the mind of the testator to give the farm to his son Michael on the condition that this son was to marry as soon as possible, and get £250 for portioning his sisters. The question is, Has the testator so expressed himself that the son may take the farm without first fulfilling the intention of the testator that his marriage was to procure £250? Must the will be read (as Mr. Browne has argued it must) as saying that the son might go at once into possession of the farm while the daughters are to wait for their portions until he marries? In other words, has the son his whole life to perform the condition, the fulfilment of which the testator intended as the means of providing his daughters' legacies?

During the argument Lords Justices FitzGibbon and Holmes pointed out that the gifts to the daughters are expressly given "on the marriage of my son Michael, and out of the fortune he receives with his wife, *or upon the marriage of each of my said daughters, with the consent of my executors.*" Therefore, if the son Michael did not get married, and one of the daughters did marry, that daughter was to get her legacy *on her marriage* with the consent of the executors. The legacy to the daughter under these circumstances would plainly have to come out of the general assets, and in the event of Michael not having provided the sum of £250 by his own marriage, the executors could sell the farm to provide the legacy for the daughter on her marriage. In my opinion this gift to the daughters on their marriage renders it impossible that the farm can be taken as vesting in Michael until he provides the £250 by his marriage. His marriage is therefore a condition precedent.

I am quite satisfied to rest my decision on the grounds stated by the Lord Chief Justice, with whose judgment I entirely agree.

FITZGIBBON, L. J. :—

I concur with the Lord Chancellor.

The graphic judgment of the Lord Chief Justice is very per-

suasive, both from the legal point of view, and upon the point of intention.

Whether a provision operates as a condition precedent or subsequent cannot be determined by any strict rule of law, but must be ascertained from the document itself, and any other case can only be an authority by way of analogy. We have to determine whether Peter Ryan intended that his son Michael should have this farm before he married, or should not have it at all unless he married in the way provided. Before dealing with the provision in question we may examine the rest of the will, and see how its other provisions bear upon the argument of the appellant, that making the provision in question a condition precedent would result in intestacy.

The testator gives his widow a life annuity of £10, "charged on the said farm and stock," and the first payment is to be made to her three months after his death. This shows that Michael was not forthwith to take the entire property in the farm, but that it was to pass to him through the executors, whose duty it would be to meet this provision for the widow out of the property coming to them in virtue of their office.

I next take the passage in which the testator confers benefits on his daughters:—"I bequeath to my daughters Alice and Johanna £100 each, and to my daughter Mary £50, said legacies to be paid to each of my said daughters on the marriage of my son Michael . . . *or* upon the marriage of each of my said daughters, with the consent of my executors." Each of the sums thus given to the daughters is payable on either of two specified events—the marriage of Michael, *or* the marriage of the daughter, the latter being in no way contingent on the former. In the former event, the testator directs the daughters' legacies to be paid out of the fortune which Michael receives with his wife. But in the event of any daughter marrying before Michael has procured the necessary fortune, where is her legacy to come from? Just as the first payment of the widow's annuity is to come from the general assets within three months after the testator's death, so each daughter's legacy, if Michael's fortune should not be available, must come out of the general assets in the same way whenever she marries. In both cases the executors must pay. I, therefore, cannot agree

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with O'Brien, J., when he says:—"There is no gift to the executors, nor the smallest indication that they were to do anything."

The provision giving a legacy to each daughter payable on her marriage with the executors' consent is ignored if we treat the provision as to Michael's marriage as a condition subsequent, and make these legacies payable only in the event of Michael's marrying and obtaining a "fortune" to pay them.

I then take the words upon which the question directly arises: "I give, devise, and bequeath all my estate and interest in my said farm, and in all stock and chattels thereon, unto my son Michael Ryan; *provided* he marries with the consent of my executors hereinafter named, and gets a substantial fortune with his wife, not less than £250." I cannot make these words consistent with the intention to say, or as equivalent to saying, "I give the farm and stock to Michael, for his life, whether he marries or not, or so long as he does not marry."

Finally, there is the gift over to Patrick, who appears to have been otherwise provided for. The whole scheme of the will seems to me to be intelligible and natural. The testator gives the property to Michael, provided Michael can raise the sum of £250 for his sisters by means of a marriage. If he cannot raise the amount in that way, he is not to take the property. If Michael should not marry, how was the testator to give effect to his wishes? The only way he thought of was by a gift to his elder son. That gift is absolute in terms, and it is a gift by way of penalty upon Michael's not marrying. The omission to make that gift to the elder son subject to the daughters' legacies, is open to two possible explanations. The testator may not have known or understood that the specific gift of the farm and stock to Patrick would leave nothing for his daughters; or, secondly, being driven to it by Michael's failing to do what he desired, he may have intentionally handed over the whole property to his elder son, to put him in his own place, trusting him to make suitable provision for his sisters, as persons in their rank of life would naturally do. For this latter course, we have the analogy of what is so often done in the case of charitable legacies, by what is called "the O'Hagan clause," an absolute gift to trustees or executors personally in the

event of the failure of charitable gifts; and also in that large class of cases where gifts to widows are coupled with words indicating the anticipation of the testators that they will provide for their children, which have been held to be absolute gifts.

As regards the form of the order, it is necessary to remark that the Queen's Bench Division made no order disposing of the money in Court. It is part of the testator's estate, and the executor can give a legal receipt for it. We must therefore declare that he is entitled, as executor of Peter Ryan, to the fund in Court, and direct that it shall be paid to him accordingly. It is, of course, open to any member of the family to take steps for the administration of the estate; but we see no reason for impounding this money in order to encourage the destruction of this little property by sending it into Chancery.

The respondent is entitled to an order affirming the order below, with costs, adding the clause I have mentioned.

WALKER, L.J.:—

I concur.

HOLMES, L.J.:—

Most men of the testator's rank and class on hearing that he had bequeathed his farm and stock to his son Michael, provided that such son married with the consent of his executors and received a marriage portion of £250, would think that the legatee would only become entitled to the legacy upon his fulfilling the specified condition as to marriage; and this ought to be the true construction unless it is contradictory of other parts of the will or repugnant to the intention to be gathered therefrom. So far from this being the case, it will be found to fit in with the general plan of disposition conceived by the testator and with the mode in which he proposed to provide for his family.

His property consisted of a fairly well stocked farm of twenty acres. He had a wife, two sons, and three daughters. The eldest son whom he named as executor had apparently been provided for in his lifetime; and he evidently determined to do something by his will for each of the other members of his family. Accordingly, he gave a small annuity to his wife, and a legacy to each

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of the daughters. He intended that his second son should ultimately have the farm and stock; but he also intended that they should be made the means of providing money to pay the legacies of the girls. He therefore bequeathed them to his son upon his marrying with the consent of his executors and receiving with his wife a marriage portion of £250 which he directed to be applied in satisfying these legacies. The whole scheme of the will would have been defeated if the son had become owner of the farm and stock whether he married or not. In that case the daughters would have been left absolutely destitute. So far from the presumption being against a particular intestacy, testator's intention was that no member of the family should be entitled under the will to the farm and stock unless and until the son married. In the meantime his widow and next-of-kin were to enjoy it. On the marriage of the son, and if the conditions attached to it were fulfilled, he got the property, and his sisters were paid their legacies. If he did not fulfil the conditions, the eldest son got it unconditionally; but this may be explained by the fact that the father had confidence in him and believed that he would use it for the benefit of all the family.

I might have been tempted to discuss at greater length the details of the will and the principles of construction applicable to it, were it not for the convincing and exhaustive judgment of the Lord Chief Justice, to which I can add nothing with advantage.

Solicitors for the plaintiff: *Connolly & Co.*
Solicitor for the claimant: *J. A. Doyle.*

G. Y. D.

LEATHEM *v.* CRAIG AND OTHERS (1).

(1896. No. 1606.)

Q. B. Div. 1898. Apr. 19, 20. Nov. 22. — *Appeal.* 1899. Jan. 17, 18, 19, 23. May 2.

Action, cause of—Conspiracy—Maliciously inducing employee not to continue in his employment—Maliciously procuring breaches of contract—Maliciously preventing persons from entering into contracts—Intent to injure—Interference with trade—Trade Union.

The plaintiff, who was a butcher at Lisburn, in the county of Antrim, was required by the defendants, who were members of a trade union, called the Journeymen Butchers Assistants' Association, to dismiss from his employment some assistants, who were not members of the defendants' trade union. He declined to do so, but subsequently attended a meeting of the defendants' association, and asked to have his employees admitted to the union, offering to pay all fines and demands against them. The defendants refused to accept this offer, unless some of the plaintiff's employees were punished by being left out of work for twelve months. This the plaintiff refused to do. The defendants thereupon endeavoured to induce some of the plaintiff's employees to leave his service, and succeeded in inducing one of them to do so in breach of his contract of service. The defendants further gave notice to M., a butcher in Belfast, with whom the plaintiff had had large business dealings for twenty years, that, unless he ceased to deal with the plaintiff, they would call out his employees. M. telegraphed to the plaintiff not to send any more goods; and in the result the plaintiff's business was practically ruined. On new trial motion in an action for damages for conspiracy:—

Held, by the Queen's Bench Division (Palles, C.B., dissenting), and, on appeal, by the Court of Appeal, that, notwithstanding *Allen* v. *Flood* ([1898] A. C. 1), an action was sustainable by the plaintiff against the defendants for maliciously conspiring to procure such breaches of contract, and also for maliciously conspiring together to injure him by preventing persons from entering into contracts with him.

Temperton v. *Russell* ([1893] 1 Q. B. 715) followed.

NEW TRIAL MOTION.

This was an action, tried before Fitz Gibbon, L.J., at the Belfast Summer Assizes, 1896, brought against the defendants for damages

(1) In the Queen's Bench Division before SIR P. O'BRIEN, L.C.J., PALLES, C.B., and O'BRIEN and ANDREWS, JJ., and in the Court of Appeal before LORD ASHBOURNE, C., PORTER, M.R., and WALKER and HOLMES, L.JJ.

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for maliciously and wrongfully procuring certain persons to break contracts into which they had entered with the plaintiff, and not to enter into other contracts with the plaintiff; and for maliciously and wrongfully enticing and procuring certain workmen in the employment of such persons to leave the service of their employers, and to break their contracts of service, with intent to injure the plaintiff, and to prevent such persons from carrying out their contracts with the plaintiff, and from entering into other contracts with the plaintiff; and for maliciously and wrongfully intimidating such persons, and coercing them to break their contracts with the plaintiff, and not to enter into other contracts with the plaintiff; and intimidating such servants in their employ, and coercing them to leave the service of their employers, to the injury of the plaintiff; and for unlawfully conspiring, together with other persons, to do the acts aforesaid, with intent to injure the plaintiff.

There was also a paragraph in the statement of claim, claiming damages for the publication of the plaintiff's name in a "black list," issued by the defendants, and a prayer for an injunction to prevent the continuance and repetition of the acts complained of.

The following facts were proved. The plaintiff was a butcher at Lisburn, in the country of Antrim, about eight miles from Belfast, where he had carried on business for a number of years. He had in his employment one Robert Dickie, his foreman, who had been with him for ten years. The plaintiff had been in the habit of sending large quantities of meat to Andrew Munce, a butcher in Belfast, and had been doing so for some twenty years. There was no contract in writing between them; but, whatever amount the plaintiff sent, Munce took and paid for—the amount being, on an average, of the value of £30 a week.

The defendants John Craig, John Davey, and Joseph Quinn, were butchers' assistants in Belfast; and the defendants, Henry Dornan and Robert Shaw, butchers' assistants in Lisburn. In the Spring of 1895 these defendants and several others in the same occupation formed themselves into an association, which was duly registered under the Trade Union Acts, 1871 and 1876,

under the title of "The Belfast Journeymen Butchers Assistants' Association," of which the defendant Davey became the secretary. The plaintiff's men were not members of the association. At the commencement of July, 1895, the defendants' association required the plaintiff to dismiss Robert Dickie from his employment, which he refused to do. Upon that the defendants' society threatened to withdraw the plaintiff's men from his service. A deputation was sent down to meet the plaintiff at Lisburn, and a meeting was held in Magill's public-house, Lisburn, on the 9th July, at which the defendants Craig, Quinn, Dornan, and Shaw were present—Craig being in the chair. The plaintiff stated that he had come on behalf of his men, and was ready to pay all fines and demands against them, and asked to have them admitted into the society. The defendant Shaw objected, and said that the plaintiff's men should be punished, and should be put out to walk the streets for twelve months. The plaintiff objected to this, as Dickie was a married man with a family. Shaw moved and Morgan seconded a resolution that the plaintiff's assistants should be called out, and it was carried. The defendants stated that they could pick out plenty of men to work for the plaintiff from their list; the plaintiff replied that they were not suitable for his business, and refused to put his own men out. Craig then said that the plaintiff's meat would be stopped at Munce's, if the plaintiff would not comply with their wishes. The plaintiff still refused. The defendants then called out some of the plaintiff's employees. Edward Dickie, a servant of the plaintiff was brought to a meeting of the defendants' society, held over Dornan's shop in Lisburn, and was ordered to leave the plaintiff, the society undertaking to pay him the same wages as he had been receiving from the plaintiff. Dickie, yielding to this order, left the plaintiff without notice. "Black lists" were issued by the society upon which the names of persons were posted who had offended against the society's rules. Leathem's name was posted, and also the name of John M'Bride, a flesher in Lisburn, who was dealing with the plaintiff. Subsequently, however, Dornan and others of the defendants came to M'Bride; and on his undertaking not to deal any more with Leathem, his name was struck out.

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On the 6th September, 1895, the defendant Davey wrote to the plaintiff the following letter:—

"I have been instructed to write you if you would be kind enough to reply on or before Tuesday, 10th, whether you have made up your mind to continue to employ non-union labour. If you continue as at present, our society will be obliged to adopt extreme measures in your case. Trusting that you will see the wisdom of acceding to our views at once, I remain," &c.

On the 13th September Davey wrote to Munce:—

"A deputation has been appointed to wait on you, or your responsible representative, on Monday evening, the 16th inst., at 6.30 p.m., to come to a decision in regard to this case of Leathem & Sons, as we are anxious to have a settlement at once."

To this Munce replied:—

"In reply to your letter *re* Leathem & Sons, I cannot see my way to attend any deputation of the sort, as it is quite out of my province to interfere with the liberty of any man. But why refer to me in the matter? I do not think it fair for you to come at me in the matter, seeing it appears to be the Messrs. Leathem that you wish to interfere with."

On the 16th September a deputation of the defendants' society went to Munce's establishment, and had an interview with W. F. Munce, the son of Andrew Munce, and asked him to put pressure on his father to stop dealing with the plaintiff. W. F. Munce replied by letter on the 17th September:—

"A deputation of the Journeymen Butchers' Association waited at Corn Market yesterday evening, with reference to the case of the purchase of meat from Henry Leathem, Lisburn. In accordance with promise, I placed the views of the deputation before Mr. Munce, and in reply he wishes to state he could not interfere to bring pressure to bear on Mr. Leathem to employ none but society men, by refusing to purchase meat from him, as that would be outside his province, and would be interfering with the liberty of another man but at the same time he will strongly recommend Mr. Leathem to adopt the views of the Journeymen Butchers' Association, and employ men belonging to the society."

On the 18th September, Davey wrote to Andrew Munce:—

"Have submitted your letter to committee. They are of opinion that in the main it is unsatisfactory, but thanking you kindly for your recommendation to Mr. Leathem, with whom we have endeavoured to make a satisfactory arrangement, but have failed, so therefore have no other alternative but to instruct your employees to cease work immediately Leathem's beef arrives."

On the 19th September Munce telegraphed to Leathem :—

"Unless you arrange with society you need not send any beef this week, as men are ordered to quit work."

Munce ceased to deal with the plaintiff, and the plaintiff was obliged to sell off the meat he had on hand at a heavy loss at any price he could get. In consequence of these transactions the plaintiff's business was ruined.

The case was tried before Fitz Gibbon, L. J., at the Summer Assizes of 1896, at Belfast. The defendants did not offer any evidence, their counsel asking for a direction on the grounds,—1, that to sustain the action a contract made with Leathem must be proved to have been made and broken through the acts of the defendants, and that there was no evidence of such contract or breach; 2, that there was no evidence of pecuniary damage to the plaintiff through the acts of the defendants; 3, that the ends of the defendants and the means taken by them to promote those ends as appearing in evidence were legitimate, and there was no evidence of actual damage to the plaintiff.

The learned Lord Justice declined to withdraw the case from the jury, and left to them the following questions:—

1. Did the defendants, or any of them, wrongfully and maliciously induce the customers or servants of the plaintiff named in the evidence to refuse to deal with the plaintiff?—*Answer*: Yes.

2. Did the defendants, or any two or more of them, maliciously conspire to induce the plaintiff's customers or servants named in the evidence, or any of them, not to deal with the plaintiff or not to continue in his employment; and were such persons so induced not so to do?—*Answer*: Yes.

3. Did the defendants Davey, Dornan, and Shaw, or any of them, publish the "black lists" with intent to injure the plaintiff in his business; and if so, did the publication so injure him?—*Answer*: Yes.

Fitz Gibbon, L.J., in summing up, told the jury that pecuniary loss, directly caused by the conduct of the defendants, must be proved in order to establish a cause of action, and he advised them to require to be satisfied that such loss to a substantial

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amount had been proved by the plaintiff. He declined to tell them that, if actual and substantial pecuniary loss was proved to have been directly caused to the plaintiff by the wrongful acts of the defendants, they were bound to limit the amount of damages to the precise sum so proved. He told them that, if the plaintiff gave the proof of actual and substantial loss necessary to maintain the action, they were at liberty in assessing damages to take all the circumstances of the case, including the conduct of the defendants, reasonably into account. The Lord Justice did not tell the jury that the liability of the defendants depended on any question of law. He told them that the questions left to them were questions of fact to be determined on the evidence, but that they included questions as to the intent of the defendants, and, in particular, their intent to injure the plaintiff in his trade as distinguished from the intent of legitimately advancing their own interests. The Lord Justice did not tell the jury that the defendants could be directly asked what their own intention was, but he did tell them that their intention was to be inferred from their acts and conduct as proved, and that, in acting upon the evidence given by the plaintiff, they were at liberty to have regard to the fact that the defendants, who might have given the best evidence on the subject, had not been produced to explain, qualify, or contradict, any of the evidence given for the plaintiff as to their own acts. Upon the meaning of the words "wrongfully and maliciously" in the questions, the Lord Justice told the jury that they had to consider whether the intent and actions of the defendants went beyond the limits which would not be actionable, namely, securing or advancing their own interests, or those of their trade, by reasonable means, including lawful combination, or whether their acts, as proved, were intended and calculated to injure the plaintiff in his trade, through a combination, and with a common purpose, to prevent the free action of his customers and servants in dealing with him, with the effect of actually injuring him as distinguished from acts legitimately done to secure or advance their own interests. Finally he told the jury that acts done with the object of increasing the profits or raising the wages of any combination of persons such as the society to which the defendants belonged, whether employers or employed,

by reasonable and legitimate means, were perfectly lawful and were not actionable so long as no wrongful act was maliciously—that is intentionally—done to injure a third party. To constitute such a wrongful act for the purposes of this case, the Lord Justice told the jury that they must be satisfied that there had been a conspiracy, a common intention, and a combination, on the part of the defendants to injure the plaintiff in his business; and that acts must be proved to have been done by the defendants in furtherance of that intention which had inflicted actual money loss upon the plaintiff in his trade; and that whether the acts of the defendants were or were not in that sense actionable, was the question which the jury had to try upon the evidence.

The jury found for the plaintiff with £250 damages, of which £50 was separately assessed for damages on the cause of action relating to the "black list," and £200 for damages on the other causes of action; and judgment was thereupon entered for the plaintiff for £250 damages and costs.

The defendants now moved to set aside the verdict and judgment so had, and that judgment should be entered for them on the ground of misdirection; or for a new trial, on the ground that the damages were excessive, and that the jury were allowed to take the "black lists" into account.

O'Shaughnessy, Q.C., *Campbell, Q.C.*, and *M'Grath*, for the defendants.

Serjeant Dodd, *Gordon, Q.C.*, and *Chambers*, for the plaintiff.

Cur. adv. vult.

Nov. 22.

ANDREWS, J.:—

In this case the jury, as I interpret their answer to the second question which was left to them, have found, upon amply sufficient evidence, that the defendants maliciously combined to induce, and did induce, customers of the plaintiff not to deal with him, and servants of the plaintiff not to continue in his employment, and the evidence in my opinion indisputably shows that the cessation of the plaintiff's customers to deal with him, and of his servants to serve him, was not of their own free will, but was brought about by coercive action on the part of the defendants. I shall consider the conduct of the defendants, as so found, independently

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of the question upon which there was no finding, though there was evidence which, in my opinion, would sustain an affirmative finding, viz. whether the defendants wrongfully and maliciously induced the plaintiff's customer, Munce, and his servant, Edward Dickie, to break their contracts with the plaintiff.

Upon the meaning of the words "wrongfully" and "maliciously" in the questions which Lord Justice Fitz Gibbon left to the jury, he has reported that he told them (and it is important to bear it in mind) that they had to consider whether the intent and actions of the defendants went beyond the limits which would not be actionable, namely, securing or advancing their own interests, or those of their trade, by reasonable means, including lawful combination, or whether their acts as proved were intended and calculated to injure the plaintiff in his trade through a combination and with a common purpose to prevent the free action of his customers and servants in dealing with him, and with the effect of actually injuring him, as distinguished from acts legitimately done to secure or advance their own interests.

Before the final decision in the recent remarkable case of *Allen* v. *Flood* (1) I cannot doubt that, in accordance with what was up to that decision understood to be the law, it would have been regarded as clear not only in law, but in reason and principle also, that the finding by the jury which I am dealing with, instructed as they were by the learned Judge, established for the plaintiff in the present case a good cause of action, and entitled him to an award of damages against the defendants for the loss which through their conduct he sustained. After the binding decision in *Allen* v. *Flood* (1) by the highest appellate tribunal, I would not regard it as becoming that, in my judgment in this case, I should express any opinion of my own as to its soundness, notwithstanding the exceptional extent and weight of strongly expressed adverse judicial opinion which the authorised report of that case records; but its existence has rendered it necessary for me to determine, for the purpose of my judgment in the present case, whether, having regard to that decision, it must now be held that notwithstanding the finding by the jury which I am dealing with, instructed as they were by the learned Judge as to the

(1) [1898] A. C. 1.

meaning of the word "maliciously" in the question he left to them, the plaintiff upon that finding has no cause of action against the defendants.

Allen v. *Flood* (1), as finally decided, was not a case of conspiracy. Flood and Taylor (the plaintiffs) were employed as shipwrights by the Glengall Iron Company on the terms that they might be discharged at any time. The jury found that Allen (the defendant) maliciously induced the company—1, to discharge Flood and Taylor from the company's employment; 2, not to engage them; and 3, that each of them had suffered £20 damages. The ultimate decision was that the defendant had violated no legal right of the plaintiffs, and that his conduct was not actionable, however malicious or bad his motive might have been, and that, notwithstanding the verdict, the defendant was entitled to judgment. I do not conceal from myself the difficulty in which that decision has involved the determination of this case, nor the force of the argument that the principle of that decision is applicable to the present case, and that, inasmuch as the acts of the defendants which I am dealing with, if committed by one of them only, would not, as it is said, have amounted, according to that decision, to an actionable wrong against the plaintiff Leathem, the fact that the defendants combined to commit them does not render them actionable, because, though committed maliciously, they would not, according to *Allen* v. *Flood* (1), constitute a legal *injuria, per se*, if committed by an individual only.

If this be the necessary result of the final decision in *Allen* v. *Flood* (1), every Court in the kingdom must now accept it; but what I regard as its disastrous character as affecting the liberties, and property, of at the least a very important class of the community, renders it, in my opinion, specially obligatory upon us to pause before arriving at such a conclusion, and to closely and carefully consider whether we are bound by *Allen* v. *Flood* (1) to hold that the conduct of the defendants in this case, as found by the jury, was lawful, and I may here observe that very much is to be found in the proved conduct of the defendants in the present case, which is not to be found in the conduct of Allen. Now it does not necessarily follow in every case that acts which, though

(1) [1898] A. C. 1.

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in fact more or less harmful *per se*, give the injured person no cause of action, if committed by an individual only, also give no cause of action even though maliciously committed, through a conspiracy by several persons. I use the word "conspiracy" here in the sense of combination and preconcert. Their commission by the concerted action of a number of persons materially alters their character, in this respect at least, that they thereby become more formidable, more oppressive, and more difficult to resist, and consequently more generally dangerous; and this alteration of character is entirely independent of motive.

The final decision in *Allen* v. *Flood* (1), as the report of that case shows, has been regarded by many eminent and experienced Judges as going very much too far in laying down that the conduct of the defendant in that case gave the plaintiffs no cause of action; but we would go greatly, and, as I venture to add, disastrously farther, by deciding that the maliciously concerted and oppressive action of the defendants in the present case gave the plaintiff no cause of action.

None of the noble Lords who concurred in the final decision in *Allen* v. *Flood* (1) laid it down that that decision would apply to a case of conspiracy, or to the case before them if it had been a case of conspiracy, and several of them carefully guarded themselves against their judgments being taken as applicable to a case of conspiracy.

Lord Herschell said (2):—

"It is certainly a general rule of our law that an act *prima facie* lawful is not unlawful and actionable on account of the motive which dictated it. I put aside the case of conspiracy, which is anomalous in more than one respect."

Lord Macnaghten said (3):—

"In order to prevent any possible misconstruction of the language I have used, I should like to add that, in my opinion, the decision of this case can have no bearing on any case *which involves the element of oppressive combination*. The vice of that form of terrorism commonly known by the name of 'boycotting,' and other forms of oppressive combination, seems to me to depend on considerations which are, I think, in the present case conspicuously absent."

(1) [1898] A. C. 1. (2) *Ibid.* pp. 123, 124. (3) *Ibid.* p. 153.

Lord Shand was even more explicit. He said (1) :—

"The case was not presented by the learned Judge to the jury as one of conspiracy, and does not raise any question of that kind. Combination of different persons in pursuit of a legitimate trade object occurred in the case of the *Mogul Steamship Company*, and was there held to be lawful. Combination for no such object, but in pursuit really of a malicious purpose to ruin, or injure another, would, I should say, be clearly unlawful, but this case raises no such question."

I may in passing also refer to the view Lord Shand took respecting the existence of malice in that case; he said (2) :—

"If anything is clear on the evidence it seems to me to be this, that the defendant was bent, and bent exclusively, on the object of furthering the interests of those he represented in all he did—that this was his motive of action, and not a desire, to use the words of the learned Judge, to do mischief to the plaintiffs in their lawful calling."

Lord Davey said (3) :—

"This, I will remind your Lordships, is not a case of conspiracy. I do not say whether, if it were, it would, or would not, make an essential difference."

An examination of the case of *Allen* v. *Flood* (1), and the judgments of all the noble Lords, as well as those of the Judges who were summoned to attend before them, and of the numerous authorities referred to, will, in my opinion, make it apparent that a decision that the finding of the jury in this case establishes no cause of action would go vastly beyond what has ever yet been decided by any case, including *Allen* v. *Flood* (1); and it would be a decision which, as I have pointed out, three of the noble Lords who decided that case (Lords Herschell, Macnaghten, and Davey) guarded themselves from being supposed to have given, and from which another of them (Lord Shand), as I think, expressed dissent.

The Mogul Steamship Company v. *M'Gregor* (4) was a case of combined action by an association of shipowners, the effect of which was harmful to certain other shipowners, but the acts of the association were done with the lawful object of protecting, and extending, their own trade, and increasing their profits, and, as it was held that they had employed no unlawful means to effect this object, it was also held that the injured shipowners had no cause

(1) [1898] A. C. 1., at pp. 168, 169.
(2) *Ibid.* pp. 163, 164.
(3) [1998] A. C. 1, at p. 172.
(4) [1892] A. C. 25.

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of action against the association. That case was treated as one in which there was no evidence of an intention on the part of the association to injure the plaintiffs beyond what may be inferred from the known effect of their competitive trade rivalry. The decision in that case shortly was that the acts of the association did not pass the limits of legitimate trade competition. They were held to be lawful, because both the object of the association and the means employed to promote it were lawful, and, as regards the shipowners to whom it was harmful, it was not malicious either in the sense in which the defendants' conduct in the present case was malicious or in any admissible sense of that word.

As regards the legal meaning of the word "malicious," I accept, if I may be permitted to so express it, what Lord Bowen (then Lord Justice Bowen) said in *The Mogul Steamship Company's Case* (1)—

"*Maliciously* means and implies an intention to do an act which is wrongful to the detriment of another. The term 'wrongful' imports in its turn the infringement of some right";

and also what Bayley, J., said in *Bromage* v. *Prosser* (2):—

"Malice in common acceptation means ill-will against a person, but in its legal sense it means a wrongful act done intentionally without just cause or excuse."

Lord Halsbury (3) regarded the trading of the association as being "no more, so to speak, a combined operation than that of a single person." He quoted as undeniable (4) what Baron Alderson said in delivering the judgment of the Exchequer Chamber in *Hilton* v. *Eckersley* (5) that

"*Prima facie* a trader in a free country, in all matters not contrary to law, may regulate his own mode of carrying on his trade according to his own discretion and choice";

and, in the course of considering what was matter contrary to law, he said (6):—

"My lords, I do not deny that there are many things which might be perfectly lawfully done by an individual, which, if done by a number of persons, become unlawful";

(1) 23 Q. B. D. p. 612.
(2) 4 B. & C. 255.
(3) [1892] A. C. p. 38.
(4) *Ibid.* p. 36.
(5) 6 E. & B. p. 745.
(6) [1892] A. C. p. 38.

and he added (1) that he should have thought it as beyond doubt or question, that a combination to insult and annoy a person would be an indictable misdemeanour. Preconcerted hissing in a theatre, and the cases of *Clifford* v. *Brandon* (2) and *Gregory* v. *The Duke of Brunswick* (3) may also be referred to in this connection.

In the present case the defendants unquestionably had a further object than their own trade interests, and a very different one, namely, by inflicting injury to punish the plaintiff, and thereby coerce him to submit to their dictation as to the manner in which he was to carry on his trade.

Lord Bramwell, in *The Mogul Steamship Company's Case* (4), after observing (5) that the plaintiffs in that case did not complain of (amongst other things) any act, the ultimate object of which was to injure the plaintiffs, having its origin in malice, or ill-will to them, said (6) :—

"It has been objected by capable persons, that it is strange that that should be unlawful if done by several which is not if done by one, and that the thing is wrong if done by one, if wrong when done by several; if not wrong when done by one, it cannot when done by several. I think there is an obvious answer, indeed two; one is, that a man may encounter the acts of a single person, yet not be fairly matched against several. The other is, that the act when done by an individual is wrong though not punishable, because the law avoids the multiplicity of crimes: *de minimis non curat lex*; while if done by several it is sufficiently important to be treated as a crime. Let it be, then, that it is no answer to the plaintiffs' complaint that if what they complain of had been done by an individual there would be no cause of action. There is the further question whether there is a cause of action, the acts being done by several."

Again, Lord Hannen said (7) :—

"I consider that a different case would have arisen if the evidence had shown that the object of the defendants was a malicious one, namely, to injure the plaintiffs, whether they, the defendants, should be benefited or not. This is a question on which it is unnecessary to express an opinion, as it appears to be clear that the defendants had no malicious or sinister intent as against the plaintiffs, and that the sole motive of their conduct was to secure certain advantages for themselves."

(1) [1892] A. C. p. 38.
(2) 2 Campbell, 358.
(3) 6 M. & G. 205, 953.
(4) [1892] A. C. 25.
(5) [1892] A. C. p. 44.
(6) *Ibid.* p. 45.
(7) *Ibid.* p. 59.

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And further on he said (1) :—

"In considering the question, however, of what was the motive of the combination, whether it was for the purpose of injuring others, or merely in order to benefit those combining, the fact of several agreeing to a common course of action may be important. There are some forms of injury which can only be effected by the combination of many. Thus, if several persons agree not to deal at all with a particular individual, as this could not, under ordinary circumstances, benefit the persons so agreeing, it might well lead to the conclusion that their real object was to injure the individual. But it appears to me that, in the present case, there is nothing indicating an intention to injure the plaintiffs, except in so far as such injury would be the result of the defendants obtaining for themselves the benefits of the carrying trade, by giving better terms to customers than their rivals, the plaintiffs, were willing to offer."

In the present case part of the defendants' concerted action was for a purpose which may be well regarded as much more oppressive and capable of becoming much more harmful to the plaintiff than an agreement among themselves not to deal with him, viz., the purpose of coercively and maliciously preventing others from dealing with or serving him in his business, unless on terms dictated by the defendants' association. Acts done for the sole purpose of lawfully benefiting those who do them, and which have a harmful effect on others, are obviously very different from acts done with the purpose of inflicting harm on others, in order to compel them to abandon their freedom of action in lawfully carrying on their own trade according to their own discretion. There are, in the latter case, elements of coercion, and wrong, which do not exist in the former; and, as *Allen* v. *Flood* (2) has not decided that a combination to inflict such wrong, though with the further object of benefiting the actors in the combination, is lawful in such a case as the present, I do not, after full consideration, regard that case as making it obligatory upon this Court to so decide.

Therefore, although conduct, such as that of Allen, by an individual only, was decided to be lawful, notwithstanding the existence of a malicious motive, I feel at liberty to hold that what would, as it seems to me, have been clear in law before *Allen* v. *Flood* (2), continues to be the law, viz. that maliciously

(1) [1892] A. C. p. 60. (2) [1898] A. C. 1.

and oppressively conspiring to induce, and inducing, a trader's customers to no longer deal with him, and his servants not to continue in his employment, although no actual contracts are thereby broken, amounts to an actionable wrong. To hold that it does not would be what I have ventured to describe as taking a disastrous step beyond what *Allen* v. *Flood* (1) decided, and would, as it appears to me, go the length of legalising, in one large class of cases at least, the intolerable scourge of boycotting. I venture to express the hope that this step will never be taken by the House of Lords; but, if it ever is to be taken, it ought, in my opinion, to be left for the House of Lords to take, and for Parliament then to provide the remedy.

The decision in the case of *Kearney* v. *Lloyd* (2), in which I concurred, does not, in my opinion, in any way conflict with my judgment in the present case, from which the facts in *Kearney* v. *Lloyd* (2) were widely different. In that case the jury found that certain parishioners (the defendants) combined to abstain themselves, but did not combine to induce other parishioners to abstain, from making voluntary contributions to a sustentation fund (the effect of which was to diminish the income of the incumbent of their parish (the plaintiff); that this was done partly with the intention of injuring the incumbent, or obliging him to leave the parish, and partly with the intention of promoting the religious interests of the parish; and that the mode by which they intended to promote the religious interests of the parish was by obliging the incumbent to leave it (which they effected by, in one sense, obliging him to resign). My own interpretation of these findings is that the promotion of the religious interests of the parish was the main and ultimate object of the defendants, and that injury to the incumbent was the known effect of, but not otherwise their intention in, withholding their contribution. The Lord Chief Baron said (3) that he found some difficulty in reading the findings in the sense that the reason of the partial intention "to injure" the incumbent (*i.e.*, by obliging him to leave the parish) was solely "to promote its religious interests," but the decision that the incumbent had no

(1) [1898] A. C. 1. (2) 26 L. R. Ir. 268. (3) 26 L. R. Ir. p. 278.

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cause of action was no doubt given irrespective of the question of intention. Abstaining from continuing voluntary contributions is, however, as regards both the givers and the receiver, obviously a very different thing from inducing customers and servants of a trader to cease to deal with or serve him in his business. The reduction of the incumbent's income in the mode in which it was effected was not, as the Lord Chief Baron clearly put it, even as the law was then understood, an actionable wrong, *i.e.*, an invasion of any legal right vested in him. But a trader has a legal right to lawfully carry on his trade, and a malicious and oppressive interference with his freedom of action in exercising that right is wrongful in the sense of being an unjustifiable invasion of a legal right vested in him. To use the familiar words of Erle, C.J.(1):—

"Every person has a right under the law as between him and his fellow subjects to full freedom in disposing of his own labour, or his own capital, according to his own will."

By "disposing" he of course meant lawfully disposing, and his proposition is undeniable. The receiver of voluntary contributions has no right to their continuance, and withholding them is not, and cannot be, properly described as wrongful.

I agree that a conspiracy to do wrongful acts will not *per se* give a civil cause of action, to support which the wrongful acts must be done. As was said by Lord Holt in *Saville* v. *Roberts*(2):—

"An action will not lie for the greatest conspiracy imaginable, if nothing be put in execution, but if the party be damaged the action will lie."

"Wrongful acts," in this connection must, I agree, be understood to mean acts invading a legal right; and, by "damaged," Lord Holt must be taken to have meant damaged by such an invasion. True it is that *Allen* v. *Flood*(3) has decided that such an interference as existed in that case by an individual with the business of another is not actionable even though harmful and malicious. It was competent to the House of Lords so to decide, and to bind all other Courts by the decision; but no tribunal can by any decision change the inherent nature of such conduct, or

(1) Erle on Trades Unions, p. 12. (2) 1 Lord Raymond 374.

(3) [1898] A. C. 1.

make it otherwise than wrongful in the sense of being an invasion of another's right. The wrongful character in this sense remains, though the injured person may be denied redress by action.

The further step, however, of deciding that such effectively harmful and oppressive interference as existed in the present case with a trader's lawful business, through a malicious combination for the purpose, is not actionable, was not taken by the House of Lords in *Allen* v. *Flood* (1), and has never yet been taken by any Court, and I do not regret to say that my judgment does not permit it to be taken by me. In my opinion such conduct remains, as it always was, civilly actionable; and although, even assuming that we are now bound to regard similar conduct, committed by one person only, as non-actionable, it nevertheless, in my opinion, by reason of the existence in it of the element of malicious and oppressive wrong, as distinguished from mere *harm*, ought to be held, notwithstanding *Allen* v. *Flood* (1), to come within the class of cases in which injurious acts, even if non-actionable when done by one only, become actionable when maliciously done through an oppressive combination for the purpose by several.

It may also be that the final decision in *Allen* v. *Flood* (1) has (as many think) established an anomaly in the law relating to such cases. If this be so, which I am not called on to decide, it is manifest that the application of the principle of that decision to the present case would largely extend, and increase, the anomaly, at the expense of obvious justice, which I do not think any Court is bound by the decision in *Allen* v. *Flood* (1) to do.

An aspect of this case remains on which I wish to make some observations, namely, the effect of the enactment in the 3rd section of the 38 & 39 Vict. c. 86, that a combination by two or more persons to do, or procure to be done, any act in contemplation or furtherance of a trade dispute between employers and workmen, shall not be indictable as a conspiracy if such act committed by one person would not be punishable as a crime. But for that enactment, it appears to me to be clear that the concerted acts of the defendants in this case would have been indictable as a conspiracy. I think it open to grave doubt whether these acts could

(1) [1898] A. C. 1.

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be held to have been done in contemplation or furtherance of a trade dispute between employers and workmen, within the meaning of that enactment; but, without by any means so deciding, I shall, for argument's sake, assume that they could. The enactment, however, did not alter their inherently oppressive character and maliciously injurious effect. On the assumption I have made, the enactment went the length, and I admit the very great length, of exempting the combination to do them from being indictable as a conspiracy; but it did not, and could not, change their inherent character and effect. The enactment deals with criminal responsibility only, and not with the right of redress for civil wrongs. If, as I think, the acts in question were civilly actionable before this enactment, I am unable to hold that the enactment which dealt with criminal responsibility, and with that only, took away from the injured party the right of redress by civil action for the damage inflicted by these acts. The civil remedy is for the injury inflicted, not for the combination to inflict it; and the mere arbitrary exemption of the conspirators from punishment as criminals (the gist of the criminality being the combination) cannot, in my opinion, be constructively extended with either reason or justice to exempt them from civil liability. And here again I trust I shall be pardoned for repeating that, even if *Allen* v. *Flood* (1) binds us to hold that the defendants' acts in the present case would not be actionable if committed by one only, they, in my opinion, assume the materially different character which I have already referred to, by the fact of their having been unjustifiably committed by the preconcert of several; and their inherent and unalterable nature, of being oppressively and maliciously injurious and wrongful to the plaintiff, by indefensibly interfering with his right to lawfully carry on his trade in accordance with his own free will, has not been and could not be changed by any act or decision.

Regarding the plaintiff's case from this point of view, I do not think that the somewhat technical doctrines to be found in the books, relating to what is not very accurately called the action for conspiracy, apply. It is not the *mere* added fact of the

(1 [1698] A. C. 1.

conspiracy which makes unlawful the acts which would not be unlawful if done by only one. It can, in my opinion, be properly held in a case like this to be the altered character which, as I have endeavoured to point out, the concerted action impresses on the acts themselves,—acts which, in my opinion, infringe on a right so important to the State as the undeniable right of every subject of the kingdom to lawfully carry on his trade or occupation free from malicious and unwarrantable interference by others —a right which I regard as being of a distinctly public character.

With respect to the damages awarded by the jury, as the defendants' concerted conduct was, according to the view I take, an actionable invasion of the plaintiff's right, proof of substantial damage was not essential; but, in my opinion, there was evidence upon which the jury were entitled to find that the plaintiff had sustained both actual and substantial damage. They were at liberty, on the evidence, to hold that there was a subsisting contract between the plaintiff and Munce, which was broken through the direct action for which the defendants were responsible, and that the plaintiff sustained substantial pecuniary loss thereby; and, as regards the amount awarded, the jury were not, in my opinion, restricted to an estimate of the mere pecuniary loss which the plaintiff had sustained, but were at liberty, owing to the existence of malicious motive on the part of the defendants, to take, as the learned Judge told them they might, all the circumstances of the case, including the conduct of the defendants, reasonably into account; and there is no such excess in the amount of damages awarded as would, in my opinion, justify this Court in interfering with the assessment on that ground.

I also think that the defendants have no cause of complaint, either in point of law, or otherwise, by reason of the learned Judge having, in compliance with the requisition of their leading counsel, made that portion of the cause of action which was included in the publication of what were called "the black lists" the subject of a separate question, and dealt with it as he did; and, in the absence of any objection or requisition, in relation to this matter, on behalf of the plaintiff, I do not think it necessary to consider whether the damages separately assessed on this head against three of the defendants might not, in a case of conspiracy like the present,

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have been included in the damages which were assessed against them all.

In no view of the case could judgment, in my opinion, be properly entered for the defendants, as there was evidence of a subsisting contract between the plaintiff and Munce, and also between the plaintiff and his servant Edward Dickie, which those persons were effectively, and wrongfully, induced by the defendants to break, which would be clearly actionable according to well-known authorities as yet unreversed; but it is unnecessary for me to say more on that subject, having regard to the opinion I have formed, and the judgment I have given on the rest of the case.

In my opinion the verdict and judgment for the plaintiff ought to stand, and the defendants' motion ought to be refused.

O'BRIEN, J.:—

In the judgments pronounced by the whole hierarchy, as they may be termed, of the English Bench, upon an occasion of supreme moment, in *Allen* v. *Flood* (1), it was, of course, impossible that any argument founded either on principle or authority could have been overlooked. And, in dealing with the present question, from which the reasonings in that case cannot be altogether excluded, our province is confined to little but an endeavour to appreciate the relative weight of the views taken on both sides, matched against each other with an extraordinary zeal and ability, which nothing but a conviction of the great social interests at stake could produce. The momentous conflict in that case was between the assertion of a right, for which the name of liberty was invoked, to do what would not otherwise be legally wrong, with a malicious object, and the earlier and wider liberty to earn a man's bread without interference, the fundamental law of human condition, announced by reason alike and revelation—a law *non scripta sed facta, ad quam non docti, sed facti sumus, non instituti sed imbuti, quam ex ipsa natura hausimus, arripuimus, expressimus.* And accordingly the Lord Chancellor of England, in the broad and masterly exposition of the law which he delivered, in accordance with the vast preponderance of judicial opinion, and with a consciousness

(1) [1898] A. C. 1.

of the gravity of the occasion, of his position as the supreme guardian of the law, and of the danger in which his great trust stood from the influence of passing interests and passions, laid down, as the broad and stable foundation of his judgment, that it was an inherent part of the common law of England that a man had a right to dispose of his own labour without interference—a right as absolute as light and life, the formal assertion of which in legal decisions no one would look to find, because it is the silent and unquestioned basis on which the whole fabric of human industry rests, though it stands disclosed in various legal relations and analogies that have approached to it. This was the solid ground on which the Lord Chancellor based his answer to the question, "What is the right infringed?"—a ground which carries in it the negation of any distinction between the breach of a contract and the renewal or continuance of a contract: a distinction that the present case puts in the most unreasonable light, for the dealing that was stopped was a dealing that had existed for several years.

The right infringed is the right to live by labour. That is a right independent of contract; and the fallacy lies in confounding the right with that which is merely the occasion of its exercise, arising from the will of another; but the right and the wrong are the same where there is the actual exercise. Several rights are recognised by law, and the subjects of legal inquiry, which nevertheless receive their effect from the will of a third person, and even without any actual effect. Such is actionable defamation, which the person to whom it is addressed may wholly disbelieve. Such is slander of title, which may be immediately contradicted. Such is malicious prosecution, which may be dismissed by the tribunal. Such was the denial of the franchise in *Ashby* v. *White* (1); the great authority for the principle that there is no wrong without a remedy, though the candidate for whom the vote erroneously rejected was given was elected.

Physical hindrances, or prevention of labour by physical means, it was conceded, would be the invasion of a right, and that would certainly be the case whether the restraint was applied to the employer or to the workmen. But the law was laid down, without

(1) 1 Sm. L. C. 231; 2 Ld. Raym. 938; 3 Ld. Raym. 320.

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any such distinction of means, in the treatise on Trades Unions of so great a lawyer as Chief Justice Erle, quoted by Mr. Justice Hawkins and Lord Morris in their judgments—a book, says Lord Esher, more full of careful and accurate law than is to be found in many judgments:—"Every person has a right under the law, as between him and his fellow-subjects, to full freedom in disposing of his own labour, or his own capital, according to his will. It follows that every other person is subject to the correlative duty arising therefrom, and is prohibited from any obstruction to the fullest exercise of this right which can be made compatible with the exercise of similar rights by others. Every act causing an obstruction to another, in the exercise of the right comprised within this description, done not in the exercise of the actor's own right, but for the purpose of obstruction, would, if damage should be caused thereby to the party obstructed, be a violation of this prohibition; and the violation of this prohibition by a single person is a wrong, to be remedied by action or indictment as the case may be."

The House of Lords, in *Allen* v. *Flood* (1), reversed the proposition, as to "a single person"; but the statement of the right remains unchallenged, and blots out any difference as to the means. Actual intimidation or coercion, it was also admitted in the judgment of the majority, would sustain the action: but it was contended, to avoid the consequences of this admission, that the Judge had stated at the trial that there was no evidence of intimidation and coercion—though, as Mr. Justice Hawkins considered, there certainly was the strongest evidence—and that the direction had the effect of confining the finding of malice to the motive and not the means; and it was, perhaps, a new canon of practice, if the Court of Appeal found evidence of coercion in the case, to reverse the judgment altogether because that issue was not left to the jury, merely upon an inference from a statement of the Judge as to what was in their mind, when there was in fact a finding capable of legally comprehending it. If temporal loss were not coercion, it could be used to the degree of a person being starved. The proposition on which the judgment of the majority

(1) [1898] A. C. 1.

was founded in this respect is opposed to the whole analogy of the law that makes duress of property, or menace of temporal loss, as effectual as physical violence to avoid all kinds of acts.

But, while *Allen* v. *Flood* (1) has settled the law for the present as to a single defendant, the whole groundwork of dispute is changed where there are several defendants. For it was not suggested in any of the judgments that the decision would embrace the care of conspiracy. On the contrary, it was expressly negatived by several of them. Thus, Lord Macnaghten guarded himself specifically against any such application of his opinion:—

"In order" (he said) "to prevent any possible misconstruction of the language I have used, I should like to add that, in my opinion, the decision of this case can have no bearing on any case which involves the element of oppressive combination. The vice of that form of terrorism commonly known by the name of boycotting, and other forms of oppressive combination, seems to me to depend on considerations which are in the present case, I think, conspicuously absent."

Lord Shand, in like manner, draws the same distinction:—

"The case" (he says) "was not presented by the learned Judge to the jury as one of conspiracy, and does not raise any question of that kind. Combination of different persons in pursuit of a legitimate trade object occurred in the case of *The Mogul Steamship Co.* v. *M'Gregor* (2), and was there held to be lawful. Combination for no such object, but in pursuit really of a malicious purpose to ruin and injure another, would, I should say, be clearly unlawful; but this case raises no such question."

In reality it did raise it, but, the Court of Appeal having held that there was not evidence of combination, and the plaintiff not having appealed, that element was taken out of the case. In *The Mogul Steamship Company* v. *M'Gregor* (2) the trade of the defendants was the primary object, and the injury to the plaintiffs was the result of the means taken to advance that object. There, as in *Allen* v. *Flood* (1), the injury to others was the thing intended, as the means of carrying out another object. The principle which makes an act committed by several unlawful, which would be lawful if committed by a single person, is stated with force and completeness in the passage quoted by Lord Justice Barry and reproduced by the Chief Baron, in *Kearney* v. *Lloyd* 3),

(1) [1898] A. C. 1. (2) [1892] A. C. 25. (3) 26 L. R. Ir. 268.

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from the report of the Commission on Trade Unions. In that statement it was assumed that the act, which combination would convert into an offence, was a civil wrong. But the law was laid down with reference to the distinction between crimes and private wrongs, for which the general term of civil wrong was sufficient, and by no means implied that the civil wrong, which was an element in the definition for that purpose, was such as is necessarily attended by a legal remedy against an individual. Such a construction would entirely exclude instances in which it is undoubted that an action for conspiracy would lie, though devoid of remedy against an individual—as, for example, a conspiracy to injure a person in his trade or profession. And therefore it could not be contended, on the terms of the proposition, that an action for conspiracy is not maintainable, because an element that is necessary to it is eliminated in the case of an individual by the judgment in *Allen* v. *Flood* (1).

No Judge has stated that an act must be actionable in the case of a single defendant, in order to sustain an action for conspiracy. The object must certainly have a wrongful quality. That was the fundamental element, which was wanting in *Kearney* v. *Lloyd* (2). That was a case in which an action was brought against several persons for dissuading others from subscribing to a sustentation fund in support of a clergyman, who resigned his position because his income was not sufficient without that subsidy. Of course the action was held not to be maintainable. The contrary decision would have been simply monstrous. As well could an action be maintained because a person was excluded from a club. There was no right, in *Kearney* v. *Lloyd* (2), that was infringed. The subscription was a voluntary thing, and the resignation was his own act. Could anyone say that a subscription to such a fund was the same thing as the right to earn wages in an employment? No one alleges that malice alone gives a right of action. The right and the wrongfulness are correlative. In law the act becomes malicious by reason of the right that is wilfully infringed.

There is an observation, which appears to me to gather up

(1) [1898] A. C. 1. (2) 26 L. R. Ir. 268.

several of the fallacies which are scattered through the arguments in the judgments of the majority in *Allen* v. *Flood* (1). The case is put by Lord Watson as if it were the question whether a person could be made liable for doing, from a malicious motive, what, without such motive he could do lawfully. In fact there are cases in law in which the malice makes the distinction of what is lawful or unlawful, as in malicious prosecution, or takes away the right that otherwise exists, as in the instance of privileged communication. But that is not the present case at all, as it was not that of *Allen* v. *Flood* (1). The malice and the right are not in the same person. The defendant, who maliciously instigated the thing, is not the person who possessed the power of dismissal. Therefore the supposed constitutional objection, that the law could not enter into a man's mind, has no place. The same point meets the case of the butler and the cook that was put in the argument. The butler tells his master he will leave unless the cook is dismissed. Lord Herschell snatched at the admission of counsel, that the cook could bring an action, as being the logical conclusion from his argument. With great respect, it is neither logical nor the law. The servant is the master of his own actions. He can choose his own company, though even for that object he cannot use threats. But in this case it was another person that assumed to choose his company for him. Allen was not a boiler-maker, as Craig was not a butcher, who wished to leave. Each was a member of a trade organisation, and had no duty or interest of his own to interfere. What relation could such a position assume but that of intimidation?

During the argument before us an idea was suggested that what is called the Conspiracy Act of 1875 (38 & 39 Vict. c. 86), some of the provisions of which were very much calculated to promote conspiracy, possessed a bearing on this question, by reason of the declaration contained in the third section, that no agreement or combination by two or more persons to do or procure to be done any act in contemplation or furtherance of a trade dispute between employer and workmen shall be indictable as a conspiracy, if such act committed by one would not be punishable as a crime. Now

(1) [1898] A. C. 1.

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this provision, in express terms, is confined to criminal cases. What follows is equally inconsistent with extension to any other subject. "Nothing in this section shall exempt *from punishment* any person guilty of a conspiracy for which a punishment is awarded by any Act of Parliament"; and further, "nothing shall affect the law relating to riot, unlawful assembly, breach of the peace, or sedition, or any offence against the State or the Sovereign." Any person reading these words would be unprepared for the idea that they were capable of being applied to any but a criminal proceeding. Both the enactment and the exceptions are quite positive and certain. This is a civil action, not an indictment. And as I understood, the suggestion went to a length, involving the conclusion that no action of conspiracy can now be maintained unless for what is a crime. I confess myself wholly unable to agree in such a startling proposition. It is not what the Legislature has said. It is not what anyone, so far as I know, has said. It is what could not have failed to be said in *The Mogul Steamship Company's Case* (1), if such an argument were tenable. The act in that case was not a crime. The ground of excuse, on which it was held no action lay, was wholly different. If the view in question were right it would have been sufficient to say at once that the thing complained of was not a crime. Nor can I say that I have a very distinct conception of the mode of reasoning by which a conclusion so remote from the words of the Legislature has been reached. It involves the necessity of saying that no action was maintainable for conspiracy, where the act was not indictable as a crime—a statement that, I would say, was not consistent with the reports, and which at most could only be supported by a doubtful opinion that in the cases reported an indictment would lie. But that would not carry us half the length required by the proposition contended for. We must hold that "indictable" included "actionable," that damages were the same as punishment, that a remedy that existed was taken away without words for the purpose, and, most extraordinary result of all, that an action for conspiracy, for what was not a crime, was taken away as regards trades unions, but remained as to all others. The

(1) [1892] A. C. 25.

absolutely certain conclusion from the words is, that the Legislature intended to leave the civil action alone and were not thinking at all about it.

Still further, there are no facts in this case at all to attract the qualified immunity, given by the statute, even from indictment. The section applies only to an act done in furtherance or contemplation of a dispute between employers and workmen. That means a specific dispute then existing or expected, and not disputes arising out of the general policy of trades unions. There was no dispute in this case between employers and workmen. Munce was the employer in relation to the plaintiff; he had no dispute with him. Leathem had no quarrel with his workmen; he took their part. He appealed to the union, whether he was to turn a man with ten children out upon the streets—an appeal which went the usual length with these friends of the working man. Besides the point that a defence founded upon the section would not arise out of the relation of the parties, we have the fact, to which the Lord Chief Justice has called my attention, that the jury have actually found the act of the defendants was committed in pursuance of a design, and for the object, of wreaking vengeance on the plaintiff.

The Act of 1871, 34 & 35 Vict. c. 31, also, which first legalised trades unions, throws light upon the construction, by the clause which declares that "the purposes of any trade union shall not, by reason merely that they are in restraint of trade, be deemed to be unlawful so as to render any member of such trade union liable to criminal prosecution for conspiracy or otherwise." This shows that the change made by the Act of 1875 was in a course of progressive immunity from criminal proceedings, and strictly confined to that object.

The case of conspiracy, therefore, as distinct from the act of an individual, stands, as to civil proceedings, unaffected by the statute law, and remains in the same position in which it was put by Lord Bramwell in *The Mogul Steamship Company's Case* (1):—

"The plaintiffs say that these things, or some of them, if done by an individual, would be actionable. This need not be determined directly, because

(1) [1892] A. C. p. 44.

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all the things complained of have their origin in what the plaintiffs say is unlawfulness, a conspiracy to injure; so that if actionable when done by one, much more are they when done by several, and if not actionable when done by several, certainly they are not when done by one. It has been objected by capable persons, that it is strange that that should be unlawful if done by several, which is not if done by one, and that the thing is wrong if done by one, if wrong when done by several; if not wrong when done by one it cannot be when done by several. I think there is an obvious answer, indeed two: one is, that a man may encounter the acts of a single person, yet not be fairly matched against several. The other is, that the act when done by an individual is wrong, though not punishable, because the law avoids the multiplicity of crimes: *de minimis non curat lex*; while if done by several it is sufficiently important to be treated as a crime. Let it be, then, that it is no answer to the plaintiffs' complaint, that if what they complain of had been done by an individual there would be no cause of action. There is the further question whether there is a cause of action, the acts being done by several."

With respect to the distinction between inducing a person to break a contract, and not to enter into a contract, that was, no doubt, the result of the way being barred in the former direction by the decision in *Lumley* v. *Gye* (1); but, even if well founded, it is not applicable to conspiracy in which the design to injure is independent of the means. However, it is clear that this idea has sprung from a confusion of relations, in applying the proposition that a person cannot be made liable for maliciously exercising a right which he possesses. The action here is for maliciously causing another person to exercise a right which that other person possessed. In one case, the right may be said to absorb the malice, though there are exceptions to the rule in the common law. But how can it absorb another man's malice? For I understand the right claimed in the proposition to be the right of dismissal, and not that of malicious persuasion; however, the distinction alleged is contrary to the whole analogy of the law. What business has the person who commits a wrong to say, there is no contract that he causes another to break. The interest that exists is invaded, For a great variety of purposes the law regards and protects the state of things that actually exists. Possession gives a right to property of all kinds. Good will is a recognised form of property.

(1) 2 E. & B. 216.

and is capable of being purchased, assigned, and valued. Yet, what is good will but a thing in expectancy, as Lord Halsbury puts it? The presumption of continuance enters into all branches of the law, from the analogy of moral and physical order; life, time, trade, are made up of successive additions. The stupendous machine of labour moves, not upon obligation, but upon the renewal of daily convenience which yet, in perpetuity, is as constant as the tides. In this respect, a man's labour who works with a pick and shovel does not differ from the commerce of the Indian Ocean, which, in *The Mogul Steamship Company's Case* (1), it was not doubted was the subject of legal injury, if there was no right of competition—the interference with which, it was thought, would lead to the life-blood of British commerce being stopped at the heart. The life-blood of labour, on the other hand, would be stopped, if the bread of wages could be taken away, because there was no contract, by the act of a person who was not in a position to make or break the contract.

In *Allen* v. *Flood* (2), between the case of entering into a contract, and breaking one, the vast mass of transactions, occupying the middle space, that consist of actual dealings, was left entirely out of sight. The present case is one that illustrates the unreasonableness of the proposition that was relied on in that case in order to turn the corner of *Lumley* v. *Gye* (3). For the dealing that was stopped by the combination had existed for twenty years, and consisted in the supply of perishable articles to a distance, which could not be returned. However, the distinction as to an existing contract was applied, in *Allen* v. *Flood* (2), to the case of a single defendant, and is repugnant to the principle of conspiracy, in which the means by which the wrong is committed are immaterial. There must be a wrong, which is the object of the conspiracy. What wrong can be conceived more cruel and grievous than wilfully depriving men of their employment? There must be a right, correlative to the wrong. What right can be more sacred than the right to live by a man's labour? But then, it is said, the wrong and the right are subject to the legal power of another person. That is the case in many instances,

(1) [1892] A. C. 25. (2) [1898] A. C. 1. (3) 2 E. & B. 216.

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in which the law nevertheless gives a remedy for wrong that requires the exercise of another person's will. That is the case of a person who is defamed; the damage comes from those who hear. That is the case of malicious prosecution; the agency is that of the law. The servant who is enticed away from his master, leaves of his own will. The woman who left her husband, in *Winsmore* v. *Greenbank* (1), did so with her own consent; the actress who broke her engagement in *Lumley* v. *Gye* (2) could have performed, if she liked. That is the case of tenants leaving their holdings on account of threats, which is put in 1 Rolle's Abridgment, 108; Action sur Case, (N.) pl. 21.

Many other examples could be given where the law allows a remedy, though the wrongful act requires the concurrence of another person's will. The rule is the same as to crimes. The law does not excuse instigation to crime because the other person need not commit the crime, or for the reason that it is impossible to separate the effect of the instigation and natural pravity of will, which was the ground erroneously assigned by Coleridge, J., for his opinion in *Lumley* v. *Gye* (2). In fact the law makes no distinction between moral and physical agency, or the degrees of the influence, when the cause is attached to the consequence by the verdict of the jury.

In this case there was not an instant of time in which anything but the speculation of legal fiction, could find room for the influence of any will but that of the defendants, for the effect of the deputation was signified by telegram, and the business was stopped. Let us see, from the correspondence, the simplicity of the machinery the defendants put in use, and the amount of free will left to the employer, which is considered to be a sufficient restraint upon the wrongful influence of others. The union ordered the employer to dismiss the plaintiff. He urged that it was not his province to interfere with the liberty of any man, using an empty constitutional formula, which in fact the Legislature by the Conspiracy Act has repudiated. They answered this weak plea with the decision of butchers: "We have no alternative but to instruct your employees to cease work immediately

(1) Willes, 577. (2) 2 E. & B. 216.

Leathem's beef arrives." He telegraphed: "Unless you arrange with Society do not send any beef this week." What a picture this presents of helpless wrong, of the cruel fiction of free agency which it is contended the law recognises as the proper obstacle to the imposition of an iron servitude by the class of persons whom public disorder commonly casts to the surface. And of course the assistant butchers were too candid and direct in their methods to give any colour to the idea of those who are willing to confound malicious instigation with honest persuasion or notice, which was the innocent gloss put upon the case of *Allen* v. *Flood* (1). Lord Bramwell says, in a judgment, that if picketing were innocent there would be no picketing; and we may say, with equal truth, if trades unions were content with persuasion, there would be no persuasion. The methods of the defendants removed all doubt on this point, for they had "black lists," like the lists of ancient Rome, containing the names of the proscribed by the union. For this kind of evil doing it is impossible that the law could be destitute of a remedy, and an action of conspiracy is the undoubted remedy. The law of conspiracy, which is traced down, in Comyn's Digest, and after him in the notes to Saunders' Reports, and in several English judgments as well as in the judgment in *Kearney* v. *Lloyd* (2), from the obsolete writ of conspiracy, through the action on the case in the nature of conspiracy, with their several distinctions, and which was originally confined to false accusations of crime, has widened out, by the expansion of social conditions and the increase of wickedness, until it embraces in its modern extent every kind of wrong committed by several against another, and has been applied in a multitude of instances where the law gives no remedy against an individual, which was the utmost that was determined by *Allen* v. *Flood* (1). The only distinction between an indictment for conspiracy and an action is that in the latter the law requires the wrong to be committed. In *Kearney* v. *Lloyd* (2), which represents the views that I now find myself in conflict with, it is stated that there is no instance of a person being held liable for doing an innocent thing by innocent means. Of course there is not. No one alleges such a proposition. But the category of

(1) [1898] A. C. 1. (2) 26 L. R. Ir. 268.

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exceptions which the Chief Baron puts, of "anything criminal, immoral, or constituting a civil wrong," would nevertheless in its strict terms be held sufficient to comprehend a malicious design to deprive a person of his livelihood, the malice being compounded both of the object, and the want of any just motive of personal right. For no one contended at any time that the object of drawing all persons into the pen of a trade union, was a ground of privilege like that which excused the act in *The Mogul Steamship Co.* v. *M'Gregor* (1), where the defendants merely waged a war of rivalry in their trade. However, if "civil wrong" be understood in the sense of actionable wrong, the rule, so confined, is contrary to a multitude of cases, in which the action was adopted, and in which nevertheless it is most certain there was no legal remedy against a single defendant, even before the decision of *Allen* v. *Flood* (2). Indeed that is the express and special use of the action of conspiracy, without which it would find no real place in practice, though it is not impossible such an action could be maintained for what is actionable also in the case of an individual. There is no remedy by action against a single person for endeavouring to compass the ruin of another in his profession or trade; for malicious abuse of legal process; for improper use of the bankruptcy law; for exposing a person to criminal charges; for false claims to property; for procuring false means of evidence; for malicious invasion of franchises and other rights of property; and a multitude of other instances might be given, in which the action of conspiracy is constantly used to pursue to redress the ingenuities and inventions of human wickedness and interest, and in which the form of the proceeding covers substantial right, grounded upon the mischief and danger of combination, which it is not in the power of a single person to resist.

So likewise, as to the objection that the right infringed is not founded upon a definite contract, for which *Allen* v. *Flood* (2) is now the authority,—it would be difficult to conceive by what logical connexion the element of contract could enter into an action of misfeasance for the damage resulting from the loss of an employment which was in fact maliciously put an end to, except

(1) [1892] A. C. 25.

(2) [1898] A. C. 1.

it be to support the foundation of a legal right, and, in that way, take the case out of the authority of *Lumley* v. *Gye* (1). If there had been a contract, the majority in the House of Lords would have decided *Allen* v. *Flood* (2) the other way. In like manner, if it had not been held there was no evidence against the other defendants, it is certain the judgment would have been for the plaintiff, from the express exception of conspiracy by Lord Shand and Lord Macnaghten, and even by Lord Herschell in terms less express, with the acquiescence of the other members of the tribunal. That is necessarily implied in *The Mogul Steamship Company* v. *M'Gregor* (3), in which the mere probability of trade was the right invaded, and in which it would have been an immediate answer to say that there was no contract, if it were considered that such an objection could apply to conspiracy. And what higher right could the contingent or speculative employment by the public confer than an actual employment by an existing person?

But, however illogical the argument that makes not the exercise of the right, but a contract relating to it, with the formation or dissolution of which the defendants have nothing to do, the test of actionable wrong in the case of an individual, the doctrine is wholly inapplicable to conspiracy, and essentially contradictory to its nature. The cause of action is not the same. The measure of damages is not the same. The plaintiff can recover damages for the acts of each of the defendants. The damages may be multiplied by the multiplied nature of several. Above all, the principle of conspiracy, that makes that an offence in several which is not in one, and that a cause of action in several which is not a cause of action in one, necessarily assumes the addition of an element of wrong and mischief that distinguishes it from an action against an individual. There was in this case a direct design to injure the plaintiff. That was malice alone. The act was not done in exercise of any right the defendants possessed. It was done through the agency of another person by improperly influencing his will; and that will was moved solely by their act, and would not otherwise have been exercised. It was done by numbers, to which the law attaches a new

(1) 2 E. & B. 216. (2) [1898] A. C. 1. (3) [1892] A. C. 25.

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and altered quality of more formidable wrong—the foundation of conspiracy—which is a difference in things themselves that can never be taken out of the law, civil or criminal, whilst there is a difference between a man and an army. Lastly, there was the damage which was so unjust as itself to make the act malicious. From these conditions the conclusion is inevitable. The law of England puts the stamp of condemnation on all malicious conduct without exception; following it into every crevice, meeting every art and evasion, and constantly admitting every kind of modification to defeat it. For the case put, of a person maliciously digging on his own land, and draining the well of his neighbour, is no exception, and demonstrates the weakness of the argument which is founded on it. In that case the act could not be prohibited without interfering with the inherent right of property; and the right of the neighbour was subject to the right of the contiguous owner. The two rights were equal. The right absorbed the malice, and could not otherwise co-exist with it. Here the defendants possessed no right which they could not otherwise exercise; and the right of the plaintiff to carry on his trade was not subject to any right in them. No right of interference with others, which the law could recognise, could attach to the aggressions of a trade union—to their plans for the revision of the relations between employers and employed—to proceedings conducting, by inevitable sequence, to what was lately expressed, with no less energy than the weight attaching to the author, as "the destructive demands of a class upon the fundamental laws on which civil order rests."

This case was tried in the state of law that existed under the decision in *Temperton* v. *Russell* (1), which must now be taken to be abrogated as to the liability of an individual; but it was an accident, not less convenient than if it were the result of prescience on the part of the distinguished Judge who tried it, that the verdict was found upon an issue of conspiracy submitted to the jury, which gives this Court the opportunity of pronouncing a judgment that may have the effect of arresting the mischief of *Allen* v. *Flood* (2) at the point of combination, without which, in this

(1) [1893] 1 Q. B. 17.

(2) [1898] A. C. 1.

country, illegal enterprises usually break down. In pronouncing that judgment, we shall have the reason for confidence that, through the mass of arguments, the conflict of minds, and the array of authority, we have reached the broad, open, solid ground of natural law, of moral law, and the law of England alike—the law of a nation that works, assuring to men the indefeasible liberty to work without let or hindrance. We shall have the consciousness of preserving the unchangeable standard of right, existing in legal tribunals, to which the parties who violate personal right, in the tendency of unlawful objects to produce unlawful means, must come, whether they will or not, and render themselves to be tried. And we shall, not least, maintain the ultimate authority of law, in declining to join in the rush down the inclined plane to the level at which are found the passions, the interests, the ignorance and error of a class, prone to dangerous means, conscious of political power, arrogant from past concession, and confident in further aggression.

PALLES, C.B. :—

I have the misfortune to differ from my brethren; and I say unfeignedly that I do so with regret—regret not based upon mere difference of judicial opinion, for the free expression of such differences is the salt of our judicial life—but regret because I feel myself coerced by the judgment of the House of Lords in *Allen* v. *Flood* (1) to hold that the law is powerless to protect, from that which the jury has found to be the tyranny of a trades union, the sacred right of a workman to save himself and his family from starvation by the work of his hands.

It is no part of my function to support by reasoning the conclusion at which that august tribunal has arrived; nor is it for me to express my concurrence in it. I am free to confess that before the decision my individual opinion was in accordance with that expressed in the masterly judgments of Lord Halsbury, Lord Ashbourne, and Lord Morris. But any opinion of mine upon the point decided is wholly immaterial here. To the extent to which it differs from the decision of the House of Lords I am not at

(1) [1898] A. C. 1.

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liberty to act upon it. I have no more to do than to determine whether, having regard to previous decisions and the principles of law, the principle of the decision in *Allen* v. *Flood* (1) is legitimately applicable to the present case. If in my opinion it is, then I am bound to apply it.

At the outset it may be convenient to state the ultimate conclusions at which I have arrived, before I state in detail the lines of reasoning by which I have been led to them.

First, then, I am of opinion that there was evidence of actionable wrongs committed by the defendants against the plaintiff, and therefore that the verdict cannot, as has been contended for the defendants, be entered for them.

Secondly, I am of opinion that the direction of the learned Lord Justice contained an erroneous definition of that which was sufficient to constitute an actionable wrong, and that, having regard to that direction, the jury may have assessed damages against the defendants for acts which, according to the conjoint effect of the decisions in the House of Lords of *The Mogul Steamship Co.* v. *M'Gregor* (2) and *Allen* v. *Flood* (1), are not actionable; and, consequently, that there should be a new trial.

In reference to the first question, viz.: whether the defendants were entitled to have a verdict directed for them, as all of us are unanimous, it is hardly necessary that I should say anything.

There was evidence that the defendants, by threats to call out the union men employed by Munce, induced him to refuse to buy the plaintiff's meat, although there was a subsisting contract between Munce and the plaintiff that he should do so.

Further, the defendants procured Dickie, a servant of the plaintiff, who was engaged by the week, to break his contract of service by leaving in the middle of a week. Their reason for procuring him so to do was the employment by the plaintiff of non-union men. *Lumley* v. *Gye* (3) and *Bowen* v. *Hall* (4) decide that such acts may be actionable wrongs.

The remaining question—that upon which I differ from my

(1) [1898] A. C. 1.
(2) [1892] A. C. 25.
(3) 2 E. & B. 216.
(4) 6 Q. B. D. 333.

brethren—is whether the defendants are entitled to a new trial. The plaintiff's complaint was not confined to the defendants' having procured Munce and Dickie to break their contracts. He insisted in addition that the defendants had conspired to procure persons, who otherwise would have entered into contracts with him, to refrain from doing so; and that such procurement was caused, *inter alia*, by coercion and intimidation. In support of this cause of action, it was proved that the defendants published a list, called in the evidence a "black list," of the names, &c. of butchers who employed non-union labour, or who purchased from those who so employed it; and, for the purpose of this judgment, I shall assume that there was evidence that, by the publication of this list, and by other means, the defendants procured other persons, who otherwise would have purchased meat from the plaintiff, to refrain from doing so.

It was also proved that a meeting of the members of the union was held on the 8th or 9th July, 1895, and that the plaintiff attended it on behalf of his men, offered to pay all fines, debts, and demands against them, and asked to have them admitted to the society. The defendant Shaw objected to their admission, and said they should first be put out of the plaintiff's employment and should walk the streets for twelve months.

This action is brought to recover damages as well for these acts as for procuring the contracts with Munce and Dickie to be broken. As the pleadings have been already referred to by Mr. Justice Andrews, it is unnecessary that I should say more in reference to them than that they allege intimidation, coercion, malicious procurement of the breaches of contract I have mentioned, malicious prevention of persons entering into other contracts with the plaintiff, and conspiracy to procure contracts already made to be broken, and to prevent further contracts being entered into.

There is a separate cause of action upon the "black list." This document, admittedly, is not a libel; and I cannot see how this cause of action can be sustained, otherwise than by treating it as an inaccurate repetition of some of the other causes of action which I have already mentioned. It is unnecessary, therefore, as it appears to me, that it should be separately considered.

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At the trial no question was left to the jury as to coercion or intimidation. I am far from saying that there was not evidence of both; but the existence of this evidence, if any, cannot, as it seems to me, cure the error, if it be one, to which I shall hereafter refer.

The questions left to the jury, in addition to one as to the publication of the "black list" (to which I think it unnecessary to refer), were in substance:—1. Whether the defendants wrongfully and maliciously induced the customers or servants of the plaintiff to refuse to deal with him? 2. Whether the defendants conspired to induce the plaintiff's customers or servants not to deal with him, or not to continue in his employment; and were such persons induced so to do? The jury answered each of these questions in the affirmative; and they assessed £200 as the damages upon the causes of action supposed to be sustained by those answers. They also assessed a further sum of £50 for damages on the claim relating to the "black list."

The learned Lord Justice states that, as to the meaning of the words "wrongfully and maliciously" in the questions, he told the jury that they had to consider whether the intent and actions of the defendants went beyond the limits which would not be actionable, namely, securing and advancing their own interests, or those of their trade, by reasonable means, including lawful combination; or whether their acts, as proved, were intended and calculated to injure the plaintiff in his trade, through a combination, and with a common purpose, to prevent the free action of his customers and servants in dealing with him, and with the effect of actually injuring him, as distinguished from acts legitimately done to secure or advance their own interests; and he instructed them that acts done with the object of increasing the profits or raising the wages of any combination of persons, such as the society to which the defendants belonged, whether employers or employed, by reasonable and legitimate means, were lawful, and not actionable, so long as no wrongful act was maliciously, that is to say, intentionally, done to injure a third party; and that, to constitute such a wrongful act maliciously, that is to say, intentionally, done to injure a third party, they must be satisfied that there had been a conspiracy, a common intention, and a combination, on the part

of the defendants, to injure the plaintiff in his business, and that acts must be proved to have been done by the defendants, in furtherance of that intention, which had inflicted an actual money loss upon the plaintiff in his trade; and that the question the jury had to try, upon the evidence, was whether the acts of the defendants were, or were not, in that sense, actionable.

At the time when the jury were so instructed, the judgments of Lords Justices Bowen and Fry in *The Mogul Steamship Co.* v. *M'Gregor* (1) had been approved of by Lord Halsbury (2), Lord Watson (3), Lord Bramwell (4), Lord Morris (5), Lord Field (6), and Lord Hannen (7), and were apparently law; and the decisions of the Court of Appeal in England in *Temperton* v. *Russell* (8) and *Flood* v. *Jackson* (9) remained untouched. Of course the learned Lord Justice adopted the law as laid down in those cases, and his direction was in exact accordance with them. In that view of the law, it would have been unnecessary to ask, and consequently the Lord Justice did not ask, the jury to divide the damages they assessed into the two separate parts which they allowed in respect—(*a*) of the injury caused to the plaintiff by the combination to induce Munce and Dickie to break their contracts, and (*b*) of the combination to prevent others entering into contracts with the plaintiff.

It follows from what I have said that, if the damage resulting from the combination of the defendants to maliciously induce others not to enter into contracts with the plaintiff, did not constitute a cause of action, the verdict cannot be sustained, as in that event the only maintainable causes of action would be those in relation to the procurement of Munce and Dickie to break their contracts; and the £200 assessed as damages could not, having regard to the summing up, be held to have been given *solely* in respect of those causes of action. It is further plain that the existence of evidence of wrongful intimidation or coercion cannot affect this result if the above hypothesis be correct.

(1) 23 Q. B. D. 598.
(2) [1892] A. C. 37.
(3) *Ib.* 43.
(4) *Ib.* 49.
(5) *Ib.* 51.
(6) *Ib.* 57.
(7) *Ib.* 60.
(8) [1893] 1 Q. B. 715.
(9) [1895] 2 Q. B. 21.

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It therefore seems to me to be impossible to sustain the verdict without determining that a combination to maliciously induce persons not to enter into contracts with another, by which that other sustains loss or harm, is actionable.

Now, the reversal (1) by the House of Lords (since the trial) of the judgment of the Court of Appeal in *Flood* v. *Jackson* (2), is a clear decision that it is not actionable for *a single person*, who is not acting in combination with others, to maliciously induce another not to enter into a contract with a third, although loss to such third person results from such inducement.

Thus the net question for our decision is whether, assuming that the act of maliciously inducing another to refrain from entering into a contract with a third party is not actionable so long as it is the act of one person only, acting independently of others, is it actionable if done by several, acting in combination?

This proposition was decided in the affirmative in *Temperton* v. *Russell* (3), and was not expressly disaffirmed in *Allen* v. *Flood* (4). On the contrary, the Lord Chancellor (5), Lord Herschell (6), Lord Macnaghten (7), and Lord Davey (8), expressly reserved their opinion upon the question. The reasons, however, which underlie the decision in *Temperton* v. *Russell* (3) have been so seriously reflected on in *Allen* v. *Flood* (4), that it is impossible that we can continue to regard it as an authority, without critically considering the effect of the latter case on the law applicable to combinations of the nature in question here.

Before doing so, however, it will be convenient that I should say something in reference to a class of cases which have been largely referred to by my brother Andrews to-day—cases of criminal conspiracies—which, in my view, are altogether outside the scope of discussion here. This course has the advantage of showing how entirely I agree with my learned brother upon many of the questions he has discussed in the course of his judgment, and of enabling me to fasten upon the one single matter of divergence between us. But, as that matter is one the

(1) *Allen* v. *Flood*, [1898] A. C. 1.
(2) [1895] 2 Q. B. 21.
(3) [1893] 1 Q. B. 715.
(4) [1898] A. C. 1.
(5) *Ib.* p. 86.
(6) *Ib.*, p. 113.
(7) *Ib.*, pp. 147, 153.
(8) *Ib.*, p. 172.

root of which appears to me to be deep down in the principles of the common law, I must be excused if I refer to some matters apparently elementary.

Combinations are of two classes:—1, those which are indictable; and, 2, those which are not. The first class only are, in my mind, strictly conspiracies; but let that pass. I shall not discuss a matter of verbiage or nomenclature. Let us call all combinations, of each class, conspiracies.

Conspiracies of the first class, *i.e.*, those which are indictable, may be so by reason either of their objects, or of their contemplated means: being either violations of public right, *i.e.*, crimes, or violations of private right in the maintenance of which the public have an interest. The exact nature of that interest need not be here discussed. I am not aware of any third kind of indictable conspiracy being known to the law. None such has been suggested by my brethren.

To take first a case of the second class, viz., one which involves, either as its object or as its means, a violation of a private right; as in such a case the conspiracy, when carried into execution, *ex hypothesi* has resulted in the violation of a private right, an action must not only lie against the conspirators, by whose joint action that act of violation has been effected; but it must have equally lain had the act been the act of one person singly. The conspiracy, in such a case, is not an essential part of the cause of action, although it may be material in evidence, by showing that others of the conspirators were liable in damages for acts of a person who, but for that conspiracy, would have been, *quoad* them, a stranger. It follows that, upon the matter in discussion here, viz.: the character, whether actionable or otherwise, of acts effected by a combination, which, if done by one person singly, would not have been actionable—no assistance can be gathered from cases of this class. I therefore refrain from saying more, as to them, than this, that some interesting learning as to them can be found in Lord Coleridge's judgment in *The Mogul Steamship Company* v. *M'Gregor* (1), and in the notes of Mr. Bigelow to the American decision of *Hutchins* v. *Hutchins* (2).

(1) 21 Q. B. D. 554.
(2) 7 Hill's New York Cases, 104; Bigelow's Leading Cases on Torts, Ed. 1889, p. 207.

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I recur now to the first class of criminal conspiracies, viz. those which have for their object, or for their means, the commission of an act which is a violation of a public right—in other words, a crime. Now, in addition to his own private rights, it is clear that every member of the community has, in common with every other member, an individual right that a public right shall not be violated in such a way as to cause him special and peculiar damage; and although, for such an invasion of the public right as affects all persons alike, an indictment, as distinct from an action, is the only remedy, yet, if an individual, by reason of the violation of the public right, sustain a special injury peculiar to himself, an action lies at his suit against the guilty parties. This principle, availed of every day to recover special damage, caused by obstructions of highways, or by other public nuisances, is equally applicable to all acts of commission which are violations of public right, and which cause special and peculiar damage to an individual. Thus, it is wholly illogical to restrict the effect of the criminality or want of criminality of a particular act to the administration of the criminal law. It has a far wider scope. It necessarily affects civil rights. Where the object of a combination does not amount to a violation of a right merely private, the title of a person, damnified by the object being carried into execution, to damages in a civil court, will depend upon the criminality of the combination. In such a case the person damaged cannot sustain an action for a violation of any private right, because, *ex hypothesi*, no such right has been violated. His only remaining right is such, if any, as he may have as a member of the public; and that right he cannot have unless the combination is a criminal one. Therefore, if it is not criminal, the person damaged cannot in the case put maintain an action at all. On the other hand, if the combination be criminal, then a public right has been invaded; and, for this violation, if accompanied by damage special and peculiar to the individual, he can, as I have shown, sustain his action. I think that this principle, amongst others, was before Lord Herschell's view in *Allen* v. *Flood* (1), when he stated that the case of conspiracy was "anomalous in more than one respect."

(1) [1898] A. C. p. 123.

It has been suggested by one of my brethren, with a view to show that this distinction between criminal conspiracies and so-called non-criminal conspiracies was novel and without solid foundation, that it was not referred to either in *The Mogul Steamship Company* v. *M'Gregor* (1), or in *Allen* v. *Flood* (2).

Now, it is true that that distinction was not referred to in *Allen* v. *Flood* (3). It could not legitimately have been considered there, because, in the opinion of the majority of the learned lords, the case of conspiracy had been abandoned at the trial, and because of that the majority, many expressly, and the others impliedly, carefully guarded themselves, as did also Lord Halsbury, C., who delivered the leading opinion of the minority, against any expression of opinion as to the effect which the existence of a conspiracy would have had upon their judgment.

In *The Mogul Steamship Company* v. *M'Gregor* (1), however, the action was brought upon a conspiracy; and there the distinction would naturally have been taken; and, taking issue with my learned brother, I propose to show that, so far from the criminality of the combination there not having been hinted at, as he seems to think, it was pointedly made part of each of the three judicial decisions in the case, viz., that at the trial, that of the Court of Appeal, and that of the House of Lords.

To show that the agreement there sued upon amounted to a criminal conspiracy, each of two elements was relied upon—1, that it was in restraint of trade; 2, that it was a malicious interference with the free course of trade, that free course of trade being, as was laid down by Sir William Erle, a matter in which the public had a sufficient interest to render criminal a malicious combination to interfere with it. The case was tried by Lord Coleridge, C.J., the appeal was heard by Lord Esher, M. R., and Bowen and Fry, L.JJ.; and the ultimate decision in the House of Lords was by a very full house. Hereafter I shall have occasion to refer again to those judgments. At present it is sufficient to state as much of them as deals *with the alleged criminality of the agreement.*

(1) [1892] A. C. 25. (2) [1898] A. C. 1. (3) [1898] A. C. p. 123.

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In his judgment at the trial Lord Coleridge says (1) :—

"It cannot be, nor indeed was it, denied that in order to found this action there must be an element of *unlawfulness* in the combination on which it is founded, and that this element of unlawfulness must exist alike whether the combination is the subject of an *indictment*, or the subject of an action. . . . It is not every combination which is unlawful; and, if the combination is lawful, that is to say, is for a lawful end pursued by lawful means . . . the action will not lie. . . . Once more, to state the proposition somewhat differently, with a view to some of the argumeuts addressed to me, the law may be put thus. If the combination is *unlawful*, then the parties to it commit a *misdemeanour*, and are offenders against the State; and if, as a result of such unlawful combination and *misdemeanour*, a private person receives a private injury, that gives such person a right of private action."

In the Court of Appeal the ninth of the propositions laid down by Lord Esher, as applicable to that case, and deduced from the considerations which he had previously stated, is (2) that—

"Such an agreement, being a public wrong, is also of itself an illegal conspiracy, and is *indictable*. . . . It follows that, in the present case, the agreement of 1885 was, within the rules 8 and 9, an *indictable* conspiracy; and that, when it was carried out to its immediate and intended effect, which was an injury to the plaintiffs' right to a free course of trade, the plaintiffs had a good cause of action against the defendants."

Lord Bowen says (3) :—

"Of the general proposition, that certain kinds of conduct, *not criminal* in any one individual, may *become criminal* if done by combination amongst several, there can be no doubt. . . . But what is the definition of an illegal combination? It is an agreement by one or more to do an *unlawful* act, or to do a lawful act by *unlawful* means: *O'Connell* v. *The Queen* (4); *Regina* v. *Parnell* (5)."

I suppose it will not be denied that the reference to these cases shows that "unlawful," as used there, meant *criminal.*

Lord Justice Fry, the remaining Judge in the Court of Appeal, read, from the judgment of Tindal, C.J., the definition of the crime of conspiracy which he gave in *O'Connell's Case* (6), and that of Mr. Justice Willes in *Mulcahy* v. *Regina* (7).

(1) 21 Q. B. D. p. 549.
(2) 23 Q. B. D. 598, p. 610.
(3) *Ib.*, p. 616.
(4) 11 Cl. & F. 155.
(5) 14 Cox, C. C. 508.
(6) 11 Cl. & F. p. 233.
(7) L. R. 3 H. L. p. 317.

So, too, when *The Mogul Steamship Company* v. *M'Gregor* (1) went to the House of Lords, all the learned Lords who expressed their opinions showed, either expressly or by implication, that in their view the decision of the case turned upon the alleged *criminal* character of the conspiracy.

Lord Halsbury, C., after referring to the case of a single trader whose goods were carried in a ship, says :—

"And, if a combination to effect that object would be unlawful, the sharers in the combined action (the captain, agent, and sailors, if they were knowingly lending their aid) could, in a charge of *criminal conspiracy*, make no defence that they were captain, agent, or sailors."

Lord Watson states (2) that he was quite satisfied with the reasons assigned for their judgment by Bowen and Fry, L.JJ., and that the observations which he had made were not meant to add to those reasons. Thus he adopts the standard by which they determined the character of an agreement necessary to a cause of action, that of *criminality*.

So, also, Lord Bramwell (3) :—

"It has been objected," he says, "by capable persons that it is strange that that should be unlawful if done by several, which is not, if done by one; and that the thing is wrong if done by one, if wrong when done by several; if not wrong when done by one, it cannot be when done by several. I think there is an obvious answer, indeed two: one is that a man may encounter the acts of a single person, yet not be fairly matched against several. The other is, that the act, when done by an individual is wrong though not *punishable*, because the law avoids the multiplicity of *crimes*. *De minimis non curat lex*; while, if done by several, it is sufficiently important to be treated as a *crime*."

Lord Macnaghten concurs—

"in the reasons assigned in the judgments which have been delivered, and in those which are yet to be delivered."

Lord Morris (4) applies the tests which were laid down in the cases of *O'Connell* v. *The Queen* (5), and *Mulcahy* v. *The Queen* (6). He shows, 1, that the object was a lawful one; 2, that the means

(1) [1892] A. C. 25.
(2) *Ibid.* p. 43.
(3) *Ibid* p. 45.
(4) [1892] A. C. p. 49.
(5) 11 Cl. & F. 155.
(6) L. R. 3 H. L. 306.

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used were lawful. As to the contract being in restraint of trade, he asks (1): "What follows?" and his answer is:

"It could not be enforced. None of the parties to it could sue each other. It might be held void, because its tendency might be held to be against the public interests. Does that make, *per se*, the combination *illegal*? What a fallacy would it be that what is void, and not enforceable, becomes a *crime*; and cases abound of agreements which the law would not enforce, but which are not *illegal*."

These expressions show that Lord Morris used the word "illegal," as did his colleagues, in the sense of *criminal*. He, too, adopts the principles laid down by Lord Justice Bowen.

Lord Field's opinion is based upon, *inter alia*, "the other reasons given by Bowen and Fry, L.JJ."

Lord Hannen says (2):—

"It was contended that the agreement between the defendants to act in combination, which was proved to exist, was illegal, as being in restraint of trade. I think that it was so, in the sense that it was void, and could not have been enforced against any of the defendants who might have violated it: *Hilton* v. *Eckersley* (3). But it does not follow that the entering into such an agreement would, as contended, subject the persons doing so to an *indictment* for conspiracy; and I think that the opinion to that effect expressed by Crompton, J., in *Hilton* v. *Eckersley* (3) is erroneous."

Thus I have shown that, in each of the three stages of *The Mogul Steamship Company's Case* (4), and by every Judge who at any of these stages expressed his opinion, criminality was the essential element of a combination, which renders actionable acts done in pursuance of it, which would not have been so were they those of a single individual.

Bearing this principle in mind, I distinguish from the present case all the decisions to which my brother Andrews has referred to establish the undoubted proposition that acts which are not criminal in one may become criminal when they are the acts of several acting in combination. I admit that an act, not actionable if it be that of one single person, may, and often does, become actionable if it be the act of several acting in combination. But

(1) [1892] A. C. p. 51.
(2) *Ibid.* p. 58.
(3) 6 E. & B. 47.
(4) 21 Q. B. D. 544; 23 Q. B. D. 598; [1892] A. C. 25.

this change in the character of the act, from innocent or neutral to criminal, or from non-actionable to actionable, results, in my opinion, from the fact of the combination being a criminal one. The criminality of the combination affects the act which is its object. When such an act is carried into execution a public right is violated, and for this violation of public right, if there be, as there was in every example which has been cited, peculiar damage to the plaintiff, an action lies.

Having said so much upon this principle, I desire to express my concurrence with Mr. Justice Andrews in his view of the general rules of law applicable to combinations. I continue to abide by the celebrated judgment of Lord Bramwell in *Regina* v. *Druitt* (1). In this country events of a few years since have, unhappily, taught us the necessity of insisting, within the legitimate limits of the common law, upon the protection which that law affords to liberty of mind and action. Nothing is more important here than to preserve the principle of law illustrated by that case, a principle which can be traced back to very early times, which was adopted and acted upon by the Court of Queen's Bench in *The Queen* v. *Parnell* (2), by Lord Halsbury, C., last year, in *Allen* v. *Flood* (3), and which remains untouched by the decision in the latter case.

I pass now from cases of this class, which I treat as outside the range of discussion here, as in them the conspiracies were criminal.

The statute of 1875 (38 & 39 Vict. c. 86) provides, by sect. 3, that "an agreement or combination by two or more persons to do . . . any act in contemplation or furtherance of a trade dispute between employers and workmen shall not be indictable as a conspiracy, if such act, committed by one person, would not be punishable as a crime." The whole course of the trial showed that the origin of the acts in question was such a trade dispute, and that these acts were done in furtherance of it. No question was left to the jury as to the *bona fides* of the motive which thus apparently actuated the defendants, and I myself am wholly unable to draw the inference of fact that the apparent motive was not the real one. The so-called conspiracy here must therefore be deemed not to be criminal, and

(1) 10 Cox, Cr. Cas. 592. (2) 14 Cox, Cr. Cas. 508.
(3) [1898] A. C. 1.

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this element, in my opinion, distinguishes the present case from *Regina* v. *Druitt* (1), and the other cases referred to by Andrews, J.

I recur now to the effect of *Allen* v. *Flood* (2) upon *The Mogul Steamship Company* v. *M'Gregor* (3) and *Temperton* v. *Russell* (4); and, for this purpose, it will be necessary for me to trace, as shortly as I can, the various elements of illegality which, from the decision in *Lumley* v. *Gye* (5), were from time to time judicially suggested to exist in a combination of several to induce a person to refrain from entering into a contract with another in the way of his trade.

From time to time, during this period, three distinct views existed as to the element in which the illegality was thought to exist. The short effect of the decisions, as they now stand is, in my opinion, to negative illegality in any of these elements, and, indeed, to negative any illegality whatsoever. But, to show this, the decisions themselves must be examined.

The views I refer to were three:—

1. That there was illegality, by reason of the agreement being in restraint of trade;

2. That there was illegality, by reason of the object being to prevent a contract being entered into, viewing such contract irrespectively of its relation to the carrying on of trade;

3. That there was illegality, by reason of the act contemplated being an interference with what was called "the free course of trade."

The first view had its origin in the judgment of Crompton, J., in *Hilton* v. *Eckersley* (6). That was an action on a bond of a number of cotton spinners, by which each bound himself to carry on his work in conformity with the resolutions of a majority of the obligors present at a meeting to be convened in a specified mode. Crompton, J., held that the agreement, being in restraint of trade, "was not only void, but illegal, and *indictable* at common law, as tending directly to impede and interfere with the free course of trade and manufacture." Lord Campbell, on the

(1) 10 Cox, Cr. Cas. 592.
(2) [1898] A. C. 1.
(3) [1892] A. C. 25.
(4) [1893] 1 Q. B. 715.
(5) 2 E. & B. 216.
(6) 6 E. & B. 47.

other hand, held (1) that, although the agreement was void and unenforceable, it was not illegal. When that case was brought to the Court of Error, it was heard by six Judges, whose unanimous judgment, given by Alderson, B., left the question undecided whether the agreement was illegal. "The case," says Alderson, B., "does not require such a decision, and we think that we ought not to express any opinion upon that point" (2).

The question was again considered in the Court of Appeal in *The Mogul Steamship Company* v. *M'Gregor* (3). The ninth of the elaborate series of propositions there laid down by the dissentient Judge, Lord Esher, M.R., was that such an agreement as he there referred to, being an act with intent to interfere with the trade of another otherwise than in the due course of trade, being a public wrong, was of itself an illegal conspiracy, and *indictable*. Upon the appeal, however, to the House of Lords in that case (4), this doctrine was expressly overruled. Each of the learned Lords who heard the appeal, Lord Halsbury, Lord Watson, Lord Macnaghten, Lord Bramwell, Lord Morris, Lord Field, and Lord Hannen expressly state that the agreement was not illegal, and their affirmance of the judgments of Bowen and Fry, L.JJ., involved that it was not so.

This doctrine may, therefore, now be treated as non-existing.

The second view is one of which the origin can be traced to Lord Esher. It is that maliciously procuring a person not to enter into a contract with another is, irrespective of its effect on trade, a wrongful act towards that other person, of the same character as procuring a person to break a contract already made. It was held in *Lumley* v. *Gye* (5) by Wightman, Erle, and Crompton, JJ. (Coleridge, J., dissenting), that an action lay for maliciously procuring a breach of contract to give exclusive personal services, if the procurement caused damage. This judgment was put, at least by Erle, J., and Wightman, J., upon the ground that the act of the defendant, of procuring Miss Wagner to break her contract with Lumley, was a wrongful act. The question

(1) 6 E. & B. p. 62.
(2) *Ibid.* p. 74.
(3) 23 Q. B. D. (C. A.) 598.
(4) [1892] A. C. 25.
(5) 2 E. & B. 216, p. 247.

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of motive, or of malice, does not appear to have formed any part of their *ratio decidendi*.

The same question came before the Court of Appeal in *Bowen* v. *Hall* (1), when the decision of the majority of the Judges in *Lumley* v. *Gye* (2) was affirmed by Lord Selborne, C., and Lord Esher (then Brett, L. J.), Lord Coleridge, C. J., dissenting. The judgment of Lord Selborne and Lord Esher was delivered by the latter; and in doing so he used expressions, unnecessary to the judgment, in which the doctrine as to this second suggested ground of illegality is first enunciated:—

"Merely to persuade a person" (he says) "to break his contract, may not be wrongful in law or fact, as in the second case put by Coleridge, J. (3). But, if the persuasion be used for the indirect purpose of injuring the plaintiff, or of benefiting the defendant at the expense of the plaintiff, it is a malicious act, which is in law and fact a wrong act, and therefore a wrongful act, and therefore an actionable act if injury ensues from it. We think that it cannot be doubted that a malicious act, such as is above described, is a wrongful act in law and in fact. The act complained of in such a case as *Lumley* v. *Gye* (2), and which is complained of in the present case, is therefore, *because malicious*, wrongful. That act is the persuasion by the defendant of a third person to break a contract existing between such third person and the plaintiff."

Thus he holds that the element of wrong in the acts complained of there, and in *Lumley* v. *Gye* (2), was not the intentional violation of the plaintiff's right, but the motive for which it was violated.

In *The Mogul Steamship Company* v. *M'Gregor* (4) Lord Esher reiterates the same principle. He cites the passage I have quoted from *Bowen* v. *Hall* (1), and proceeds:—

"The law there is laid down that a malicious motive in the defendant may make an act, which would not be wrongful without the malice, a wrongful act when done with malice. It was thought that the judgment in *Lumley* v. *Gye* (2) was founded on the view that there was malice in the defendant, and that view was adopted and approved in *Bowen* v. *Hall* (1). The word 'malice' is satisfied by the thing being done with the knowledge of the plaintiff's right, and with intent to interfere with it 'maliciously,' or, which is the same thing, 'with notice.'"

In *Temperton* v. *Russell* (5) Lord Esher took the last step, and extended the principle of *Lumley* v. *Gye* (2) to a conspiracy to

(1) 6 Q. B. D. 333, 338.
(2) 2 E. & B. 216.
(3) *Ibid.* p. 247.
(4) [1892] A. C. 25.
(5) [1893] 1 Q. B. 715.

prevent contracts being entered into. It was an action against certain officers and members of trades unions, for two matters—first, for maliciously procuring persons who had entered into contracts with the plaintiff to break such contracts. To this extent the decision was no more than an extension to all contracts of the principle laid down in *Lumley* v. *Gye* (1) as applicable to contracts of personal service. The second cause of action was for maliciously conspiring to induce persons not to enter into contracts with the plaintiff. As to this Lord Esher, in giving judgment, says (2):—

"The next point is, whether the distinction between the claim for inducing persons to break contracts already entered into with the plaintiff, and that for inducing persons not to enter into contracts with the plaintiff, can be sustained, and whether the latter claim is maintainable in law. I do not think that distinction can prevail. There was the same wrongful intent in both cases, wrongful because malicious. There was the same kind of *injury* to the plaintiff. It seems rather a fine distinction to say that, where a defendant maliciously induces a person not to carry out a contract already made with the plaintiff and so injures the plaintiff, it is actionable, but where he injures the plaintiff by maliciously preventing a person from entering into a contract with the plaintiff, which he would otherwise have entered into, it is not actionable. At any rate, it appears to me that, on the principle acted on in the case of *Gregory* v. *Duke of Brunswick* (3), where defendants conspire and combine together maliciously to injure the plaintiff, by preventing persons from entering into contracts with him, and injury results to the plaintiff, it is actionable."

He then refers to the judgments in *The Mogul Steamship Company* v. *M'Gregor* (4) in the House of Lords; but the opinions there expressed referred to such conspiracies to prevent contracts being entered into as amounted to conspiracies to prevent the free course of trade. The judgments of Lopes, L. J., and A. L. Smith, L. J., are also based on the latter ground.

As to the portion of Lord Esher's judgment which I have read, it is to be observed that when he says there was an "*injury* to the plaintiff" he overlooks the true distinction between the cases. If he uses "injury" in its strict sense as an "*injuria*," such an *injuria* exists in the first, but not in the second case.

(1) 2 E. & B. 216.
(2) [1893] 1 Q. B. 728.
(3) 6 M. & G. 953.
(4) [1892] A. C. 25.

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As to it, Lord Herschell, in *Allen* v. *Flood* (1), remarks :—

"It seems to have been regarded as only a small step from the one decision to the other; and it was said that there seemed to be no good reason why, if an action lay for maliciously inducing a breach of contract, it should not equally lie for maliciously inducing a person not to enter into a contract. So far from thinking it a small step from the one decision to the other, I think *there is a chasm between them*. The reason for the distinction between the two cases appears to me to be this: that in the one case the act procured was the violation of a legal right, for which the person doing the act which injured the plaintiff could be sued, as well as the person who procured it; whilst in the other case no legal right was violated by the person who did the act from which the plaintiff suffered: he would not be liable to be sued in respect of the act done, while the person who induced him to do the act would be liable to an action."

The *rationes decidendi* of all the learned Lords who constituted the majority there are based upon the doctrine of Lord Esher being unsound; and the decision is, in my opinion, a disaffirmance of it. This second view, too, may therefore be now considered as finally overruled.

The third and last view was, at one time, worthy of much graver consideration; as, although it has since been determined not to be law, it found acceptance with such eminent jurists as Sir William Erle, Lord Halsbury, Lord Ashbourne, Lord Morris, Lord Bramwell, Lord Field, Lord Hannen, Lord Ludlow, Lord Justice A. L. Smith, Lord Justice Collins, and the vast majority of the Judges who were consulted by the House of Lords in *Allen* v. *Flood* (2). It admitted the principle that, to constitute an indictable conspiracy, the combination must have, for its ultimate object, or for its means, an illegal, though not necessarily a criminal, act; and that, where the illegality consisted of the violation of a private right, such right should be one in which the public had an interest. Proceeding upon this admission, it found the illegal object of the combination in its object being the violation of the right of every person to full freedom in disposing of his own labour, or his own capital, according to his own will; and it derived the element of public interest from the interest of the public that the free course of trade should not be obstructed or interrupted.

(1) [1898] A. C. p. 121. (2) [1898] A. C. 1.

It is thus expressed by Sir William Erle (1) :—

"Every person has a right under the law, as between him and his fellow-subjects, to full freedom in disposing of his own labour, or his own capital, according to his own will. It follows that every other person is subject to the correlative duty arising therefrom, and is prohibited from any objection to the fullest exercise of this right which can be made compatible with the exercise of similar rights by others. . . . Every act causing obstruction to another in the exercise of the right comprised within this description, done, not in the exercise of the actor's own right, but for the purpose of obstruction (*i.e.* maliciously), would, if damage should be caused thereby to the party obstructed, be a violation of this prohibition; and the violation of this prohibition by a single person is a wrong, to be remedied either by action, or by indictment, as the case may be."

Later on he adds (2) :—

"There seems also to be authority for saying that a combination to violate a private right, in which the public has a sufficient interest, is a crime, such a violation being an actionable wrong."

That which I particularly desire to call attention to in this passage is, that the indictable character of the conspiracy is made to depend upon the act which is its object being an actionable wrong.

This, too, is the *ratio decidendi* of Bowen, L.J., in *The Mogul Steamship Company* v. *M'Gregor* (3). He commences with the general proposition that certain kinds of conduct, not *criminal* in any one individual, may become *criminal* if done by combination among several; and, in proceeding to consider whether the combination there was illegal, he refers to the ordinary definition of a *criminal* conspiracy—an agreement "to do an unlawful act, or to do a lawful act by unlawful means;" and then, asking, "Have the defendants done so?" he says (4) :—

"A moment's consideration will be sufficient to show that this new inquiry only drives us back to the circle of definitions and legal propositions which I have already traversed in the previous part of this judgment. The unlawful act agreed to, if any, between the defendants, must have been the intentional doing of some act to the detriment of the plaintiffs' business without just cause or excuse. Whether there was any such justification or excuse for the defendants is the old question over again, which, so far as regards an individual trader, has been already solved."

(1) Erle on Trades Unions, p. 12.
(2) *Ibid.* p. 32.
(3) 23 Q. B. D. 613.
(4) *Ibid.* 617.

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I go back now to the "circle of definitions and legal propositions" to which he refers. They are contained in the portion of his judgment in which he deals with the character that the act there complained of would have had, had it been that of a single person. It is in substance this (1): "All personal wrong means the infringement of some personal right; the plaintiffs had a right to be protected against certain kind of conduct." Then comes his proposition of law: "Intentionally to do that which is calculated, in the ordinary course of events, to damage, and which does in fact damage another in that other person's property or trade, is actionable, if done without just cause or excuse." The acts complained of were intentional, and were calculated to do the plaintiffs damage in their trade. To see, therefore, whether they were wrongful, the question arose, Were they done without just cause or excuse? Such just cause or excuse, he ultimately holds, is to be found in the defendants' own positive right, subject to certain limitations, to carry on their own trade freely, in the manner that best suited them and which they thought best calculated to secure their own advantage. He then discusses the question of what these limitations are, and holds that the defendants had done nothing more against the plaintiffs than "pursue to the bitter end a war of competition waged in the interest of their own trade"; and that "there was no personal intention to do any other or greater harm to the plaintiffs than such as was necessarily involved in the desire to attract to the defendants' ships the entire sea freights of the port, a portion of which would otherwise have fallen to the plaintiffs' share"; and such a commercial motive does not deprive of "just cause or excuse" acts done in the course of trade which, but for such motive, would be justifiable.

So far, I have shown that, in the opinion of Lord Justice Bowen, the actionable character of an act done in pursuance of a combination is identical with the actionable character of the same act, if done by a single individual. I now go back to the element which was alleged to differentiate the act of one from that of several acting in combination (2):—

(1) 23 Q. B. D. 598, 617. (2) 23 Q. B. D. 617.

"The only *differentia* that can exist must arise, if at all, out of the fact that the acts done are the joint acts of several capitalists, and not of one capitalist only. . . . But I find it impossible myself to acquiesce in the view that the English law places any such restriction on the combination of capital as would be involved in the recognition of such a distinction. If so, one rich capitalist may innocently carry competition to a length which would become unlawful in the case of a syndicate with a joint capital no larger than his own; and one individual merchant may lawfully do that which a firm or a partnership may not. What limits, on such a theory, would be imposed by law on the competitive action of a joint stock company, limited, is a problem which might well puzzle a casuist."

I pass now to the opinions delivered in the House of Lords in *The Mogul Steamship Co.* v. *M'Gregor* (1), opinions which appear to me to be decisive on the question for decision here.

Lord Halsbury, C., follows the same chain of reasoning as did Bowen, L. J:—

"What" (he asks (2)) "is the wrong done? What legal right is interfered with? What coercion of the mind, or will, or of the person is effected? All are free to trade upon what terms they will; and nothing has been done, except in rival trading, which can be supposed to interfere with the appellants' interests. I think this question is the first to be determined, What injury, if any, has been done? What legal right has been interfered with?"

And then Lord Halsbury proceeds to deal with the question of combination in words which are every whit as applicable to the present case as they were there—

"Because, *if no legal right has been interfered with*, and no legal injury inflicted, *it is in vain to say that the thing might have been done by an individual, but cannot be done by a combination of persons.* . . . In this case the thing done, the trading by a number of persons together, effects no more, and is no more, so to speak, a combined operation than that of a single person. If the thing done is rendered unlawful by combination, the course of trade by a person who singly trades for his own benefit, and apart from partnership or sharing profits with others, but nevertheless avails himself of combined action, would be open to the same objections. The merchant who buys for him, the agent who procures orders for him, the captain who sails his ship, and even the sailors (if they might be supposed to have knowledge of the transaction) would be acting in combination for the general result, and would, whether for the benefit of the individual, or for an associated body of traders, make it not the less combined action than if the combination were to share profits with independent traders."

(1) [1892] A. C. 25. (2) [1892] A. C. p. 38.

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Lord Watson says (1) :—

"If neither the end contemplated by the agreement, nor the means used for its attainment were contrary to law, the loss suffered by the appellants was *damnum sine injuria*."

Lord Bramwell refers to the passage cited by the Master of the Rolls from Sir William Erle, and says (2) :—

"True, Sir William Erle means that where the violation of a private right is an actionable wrong, a combination to violate it, if the public has a sufficient interest, is a crime. But in this case I hold that *there is no private right violated*. . . . He [the Master of the Rolls] cites Sir William Erle in support of his proposition, who clearly is speaking of acts which would be actionable in an individual, and there is no such act here."

Lord Morris treats the actionable character of the act of a number in combination as identical with that of a similar act by a single person, and he says (3) :—

"Again, what one trader may do in respect of competition, a body or set of traders can lawfully do; otherwise a large capitalist could do what a number of small capitalists, combining together, could not do, and thus a blow would be struck at the very principle of co-operation and joint stock enterprise. I entertain no doubt that a body of traders whose motive-object is to promote their own trade, can combine to acquire, and thereby in so far to injure, the trade of competitors, provided they do no more than is incident to such motive-object, and use no unlawful means."

And he concludes by adopting entirely "the principles laid down by Bowen, L. J., in his judgment, with such felicitous illustrations."

Amongst Lord Field's reasons for dismissing the appeal are the "reasons given by the learned Lords Justices Bowen and Fry."

I have thus, at a length which I fear has been wearisome, discussed the judgments and opinions in *The Mogul Steamship Co.* v. *M'Gregor*, for the purpose of showing that the basis of the affirmance by the House of Lords of the judgment for the defendants there—the actual *ratio decidendi* of the House—was that acts done by several persons acting in combination, although

(1) [1892] A. C. p. 42.
(2) *Ibid.* p. 48.
(3) [1892] A. C. p. 50.

they cause loss or harm to another, cannot be made the subject of an action unless the same acts would have been actionable had they been those of one person only acting alone and independently of others.

The *ratio decidendi* of the House of Lords in that case, I make my *ratio decidendi* here.

I take the proposition of law thus established in conjunction with the further proposition of law laid down by the House of Lords in *Allen* v. *Flood* (1), that acts of the character of some of those which in the present case were submitted to the jury as acts in respect of which they might assess damages against the defendants, viz. the acts of prevention of contracts being entered into, would not have been actionable had they been those of a single person only; and I hold it to be the inevitable result of those two propositions that those last-mentioned acts of the defendants, although the acts of several acting in combination, are not actionable.

The damages then which have been assessed have been awarded in one single sum, unapportionable by us, in respect of two classes of acts, some of which are not actionable, others of which, such as procuring Munce and Dickie to break their contracts, are actionable. Such an assessment of damages cannot, in my opinion, stand; and I am, therefore, of opinion that there should be a new trial.

SIR P. O'BRIEN, L.C.J.:—

This case as presented at the bar involved issues which render its determination of supreme importance.

The argument went substantially to the length that most forms of oppressive combination in this country were legalised by the decision of the House of Lords in *Allen* v. *Flood* (1). I concur in the result arrived at by my brothers O'Brien and Andrews; and, though I do not concur in the result arrived at by the Lord Chief Baron, there were a great many observations made by him in which I cordially agree.

The main, indeed, the sole contention, at the bar on behalf of

(1) [1898] A. C. 1.

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the defendants was that the present case is ruled by the decision in *Allen* v. *Flood* (1) in the House of Lords. Mainly in deference to the language of the noble Lords who decided the case, I hold that it is not to be taken as governing the case now before us. As has already been pointed out, this case is one of conspiracy. The case of *Allen* v. *Flood* (1) was not one of conspiracy. Lord Herschell is there reported to have said (2) :—

"It is certainly a general rule of our law that an act *prima facie* lawful is not unlawful and actionable on account of the motive that dictated it. *I put aside the case of conspiracy which is anomalous in more than one respect.*"

This is the language of Lord Herschell. He had before his mind the legal doctrine as to conspiracy; and, in so many words, he puts aside the case of conspiracy, and that, too, in a case of trades unions, long after the Act of 1875, to which my Lord Chief Baron attaches so much importance, had passed. Am I told that the logical result of the decision of *Allen* v. *Flood* (1) is to make it conclusive of a case of conspiracy, when Lord Herschell puts the doctrine applicable to conspiracy aside, as a thing apart, and as "anomalous in more than one respect"?

But, before I advert to the remarkable passage in Lord Macnaghten's judgment as to boycotting and oppressive combination, let me refer to what Lord Shand says. He says :—

"The case was not presented by the learned Judge to the jury as one of conspiracy, and does not raise any question of that kind. Combination of different persons in pursuit of a legitimate trade object occurred in the case of *The Mogul Steamship Company* v. *M'Gregor* (3) and was there held to be lawful. Combination for no such object, but in pursuit merely of a malicious purpose to ruin or injure another, would, I should say, be clearly unlawful; but this case raises no such question."

I repeat the words, "this case raises no such question." Yet, notwithstanding this clear language, I am now told that the noble Lord established the result which he so emphatically disclaimed. But let me quote the words again :—

"Combination . . . in pursuit merely of a malicious purpose to ruin or injure another, would, I should say, be clearly unlawful."

(1) [1898] A. C. 1. (2) [1898] A. C. pp. 123,124. (3) [1892] A. C. 25.

Why, this is the very state of facts which was, in the narrowest view of their finding, found to exist by the jury after a careful direction by the learned Judge that the defendants were in no way responsible for acts done to secure or advance their own interests. It is the very condition of things which Lord Shand said was "clearly unlawful."

Lord Justice Fitz Gibbon had evidently before his mind the decision of the House of Lords in the case of *The Mogul Steamship Company* v. *M'Gregor* (1). In fact he drew the very distinction that Lord Shand drew; and this distinction is of vital importance, because it is one thing if damage results to an individual from acts done by several individuals acting in combination to advance their own interests, and another if damage result from acts maliciously done in pursuance of a conspiracy, the object of which is to injure an individual; and by reference to this distinction, the verdict of the jury can be readily sustained, without adverting to any question of intimidation or coercion in the case.

The case of *The Mogul Steamship Company* v. *M'Gregor* (1) is of supreme importance in the consideration of this case; not only because it was a case of conspiracy, but because several of the Lords, as I shall hereafter point out, drew the very distinction that Lord Shand drew in *Allen* v. *Flood* (2). By and by, however, when I come to examine the charge of the learned Lord Justice, I think I shall be able to show that he imposed a wider legal obligation and a greater burden of proof on the plaintiffs than Lord Shand's proposition involves—a legal obligation and burden of proof which relieves the case from all the difficulties that existed and caused a difference of opinion in *Allen* v. *Flood* (2).

It may be said that Lord Herschell's and Lord Shand's statements as to conspiracy were mere *obiter dicta*; but any person that reads the judgments will see that the noble Lords had before their minds the bearing of their decision upon the law of conspiracy; and that, though what they said in relation to the law of conspiracy was not essential to their judgment, yet, feeling that branch of law to be connected with the maintenance and establishment of peace and social order, the exercise of lawful rights and

(1) [1892] A. C. 25. (2) [1898] A. C. 1.

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the enjoyment of property, they, and Lord Macnaghten also, carefully inserted in their judgments the passages that are to be found there relating to the law of conspiracy.

As a conspicuous example of this I refer to what I have already styled the remarkable passage in Lord Macnaghten's judgment as to boycotting and oppressive combination. With great deliberation and distinctness he expressed himself thus:—

> "In order to prevent any possible misconstruction of the language I have used, I should like to add that in my opinion the decision of this case can have no bearing on any case which involves the element of oppressive combination. The vice of that form of terrorism commonly known by the name of 'boycotting,' and other forms of oppressive combination, seems to me to depend on considerations which are, I think, in the present case conspicuously absent."

It is obvious that every word in that sentence was considered with the most careful deliberation. What then does he say? This, that the decision in *Allen* v. *Flood* (1) can have no bearing on any case which involves the element of "oppressive combination." I desire to bring into prominent relief the words "oppressive combination." Lord Macnaghten was not using any terms of art, any technical terms, when he used the words "oppressive combination."

Was, then, the combination which existed in this case an oppressive one? What did the constitutional tribunal—and there could be no better of its kind, a jury of the citizens of Belfast—find upon the evidence submitted to them? Not that the combination of the defendants rested upon any regard for their own legitimate interests—this they negatived—but that the operative motive of their combined action was a vindictive desire to punish, hurt, and harm the plaintiff for having in the legitimate conduct of his business employed non-union labour: in other words, that the defendants maliciously combined to abuse their powers over the union men for the vindictive purpose of injuring the plaintiff. What was done was not the honest withdrawal of union men in protection of legitimate interests, it was no mere lawful strike, but a vindictive abuse of authority and influence over union men for the punishment and injury of an individual.

(1) [1898] A. C. 1.

The defendants wielded great power and influence; by that power and influence they controlled union labour; and, according to the finding of a jury of Belfast merchants they abused this power and influence, and maliciously, and with intent to injure the plaintiff, combined to deprive the plaintiff, and did actually deprive him, of the means of carrying on his trade, because he, in the exercise of his lawful rights, would not discharge faithful servants who had served him honestly for years. Was this oppression? In my judgment it was great and galling oppression. The plaintiff, according to the evidence, approached these defendants, and made a piteous appeal to them on behalf of his men. What took place on the occasion cannot be too conspicuously made apparent.

The plaintiff, Leathem, in his evidence says:—

"I went to a meeting of the Association, and said that I came on behalf of my men, and was ready to pay all fines, debts, and demands against them; and I asked to have them admitted to the society. Defendant Shaw got up and objected to their being allowed to work on, and to their admission, and said my men should be put out of employment and could not be admitted, and should walk the streets for twelve months. I said it was a hard case to make a man walk the streets with nine small children, and I would not submit to it. Shaw moved a resolution that my assistants should be called out; a man named Morgan seconded Shaw's resolution, and it was carried."

I stop here and ask what was this but vengeance and an attempt to coerce and intimidate? And I add another question, Was it to protect this that the Trade Union Acts were passed? The witness proceeds:—

"Craig was in the chair; I was sitting beside him. He said there were some others there that would suit me as well. He picked some out, and said they could work for me. I said they were not suitable to my business, and I would keep the men I had. I said I would not put out my men. Craig then spoke and told me my meat would be stopped if I would not comply with their wishes. Munce had been getting about £30 worth weekly of meat from me for twenty years."

Later on, in his cross-examination, he says:—

"Some of my men were brought up to the trade and their fathers were in it before them. I went to have them accepted as members; they would not admit them for twelve months. They told me there were plenty of nice men

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in the society that they picked for me and that I could employ. I said these men would not do me; I wanted men who could do my work."

Again I ask, what does all this mean? What does it amount to? A denunciation, in so many words, against men who lawfully bestowed their labour, that they should walk the streets, that they and their families should starve, because they did not obey the behests of the defendants—an attempt by the use of intemperate and violent language to coerce the plaintiff Leathem to discharge from his employment men who were peculiarly fitted to assist him in his trade, and to force upon him the employment in that trade of men whom he believed were not fit for the task. What else did this language convey? Beyond all question it conveyed also a threat that Munce's custom would be stopped unless he surrendered his right to carry on his trade in his own way—a right so clearly recognised by Sir William Erle in his work on Trades Unions, and by Baron Alderson in the Exchequer Chamber in *Hilton* v. *Eckersley* (1). In that case that very distinguished Judge said:—

> "*Prima facie* it is the privilege of a trader in a free country, in all matters not contrary to law, to regulate his own mode of carrying on his trade according to his own discretion and choice."

What was the *modus operandi* and the object, the methods and the aim, of the combined action of the defendants? Having regard to the finding of the jury and to the direction of the Judge, and to the distinction which he drew in his charge as to the legitimate action in self-interest, and to a combination to prevent the free action of others (I emphasise the words "to prevent the free action of others"), I think the combined action of the defendants had for its object the punishment of the plaintiff Leathem for not yielding up his discretion at their dictation; and the methods by which they worked were intimidation, express threats of molestation, and actual molestation, to the plaintiff in his trade. What the defendants did—what they aimed at—was not the honest calling out of union men in contemplation and furtherance of a trade dispute. This, I consider, the jury have negatived. Their real

(1) 6 E. & B. 47.

operative motive was the punishment, injury, and harm, of Leathem, and their *modus operandi* was molestation of him in his trade, and intimidation and coercion of those who would deal with or serve him. This was the object and these were the methods of their combined action.

As to the case of *Allen* v. *Flood* (1), that case, as has been pointed out, was not a case of conspiracy; but, in addition to that circumstance, I can find nothing in that case tantamount to a denunciation against men of the penalty of walking the streets for a whole year—a denunciation which was eminently calculated to leave them no freedom of will or action whatever. I can find in that case nothing like the intimidatory language that was proved to be used in this. I cannot find in *Allen* v. *Flood* (1) any trace of "black lists," or of the disfavour, odium, and terrorism, created thereby. I can find nothing comparable in that case to the struggle Leathem made to retain in his service the men who served him faithfully for years. I can find in that case nothing at all tantamount to the efforts made in this case by express language to force incompetent men upon Leatham. I cannot find in that case any such plain, palpable, and abject surrender as was made by Munce in this case. I can find nothing tantamount to the express threats that Munce's meat, when received from Leathem, would remain unbought. Look at Munce's letters of the 14th and 17th September, written to one of the defendants, or rather, as his son said, written for him. The letter of the 17th September states, "In accordance with promise, I placed the views of the deputation before Mr. Munce, and in reply he wishes to state he could not interfere to bring pressure to bear on Mr. Leathem to employ none but society men, by refusing to purchase meat from him, as that would be outside his province, and would be interfering with the liberty of another man." This was Munce's view of what the defendants' action would lead to—viz., interference with the liberty of another man, yet, in the end, plainly against his will, he stopped dealing with that old customer with whom he had been dealing for twenty years.

(1) [1898] A. C. 1.

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In *Allen* v. *Flood* (1), no doubt, the jury found that the defendants' conduct was malicious, but some of the law Lords plainly thought that there was no evidence of malice at all. Lord James of Hereford said his action had not injured the plaintiffs, and that what he did was merely communicating to the Glengall Company, what he described as a preformed intention on the part of the boiler makers. At pages 177 and 178 of the report he is represented as having said—

> "He [Allen, the defendant] had learned that that intention [an intention to discontinue work] was formed by the boiler-makers before his arrival at the shop. For him to communicate such intention to the Company did not injure the respondents. The boiler-makers would have acted upon it whether the Company knew or were ignorant of their resolution. For they were about to desert their work when the appellant by his threat prevented them from so doing, and prevailed upon them to give him an opportunity of communicating with the representatives of the Company. For myself, I believe that the appellant communicated only the boiler-makers' preformed intention."

Lord James appears to me to have thought there was no case for the jury—in fact, that there was no evidence of malice on the part of Allen: that in fact his conduct was meritorious. No one could take a similar view of the facts of this case.

Lord Shand is reported to have said (2)—

> "If anything is clear upon the evidence it seems to me to be this, that the defendant was bent, and bent exclusively, on the object of furthering the interests of those he represented in all he did; that this was his motive of action, and not a desire, to use the words of the learned Judge, 'to do mischief to the plaintiffs in their lawful calling.'"

I quote this passage to show how different the facts of this case are from the facts of *Allen* v. *Flood* (1). No one could say that there was not evidence in this case to warrant the finding, at least, of malice.

I know well, and let it not be thought for a second of time that I overlook, the fact that Lord Shand, as well as Lords Herschell, Macnaghten, Watson and Davey, dealt with the case on the basis of the existence of malice; but I am anxious to show how meagre the facts were in *Allen* v. *Flood* (1) as compared with

(1) [1898] A. C. 1. (2) [1898] A. C. pp. 163, 164.

those in the present case. The facts in this case—a case of conspiracy—not only, in my opinion, establish the existence of malice, but of coercion and intimidation.

There is a passage in Lord Herschell's judgment in *Allen* v. *Flood* (1) to which I would like to refer. He says (2)—

"I think the use of the word 'punishment' has proved misleading—that word does not necessarily imply that vengeance is being wreaked for an act already done, though no doubt it is sometimes used in that sense. When a Court of Justice, for example, awards punishment for a breach of the law, the object is not vengeance. The purpose is to deter the person who has broken the law from a repetition of his act, and to deter other persons also from committing similar breaches of the law."

Now the jury in the present case found that the acts which caused the damage to Leathem were done in furtherance of an intention to injure him; and what was this but vengeance pure and simple?

Lord Herschell, further on, says (3)—

"Self-interest dictated alike the act of those who caused the damage and the act which was found to have induced them to cause it."

This is the very thing that is negatived by the finding of the jury in the present case.

But, to return to the case of *The Mogul Steamship Company* v. *M'Gregor* (4)—a case, unlike other cases cited, being one of conspiracy, as should never be lost sight of in the case now before us,—there Lord Bowen (then Lord Justice Bowen) says (5)—

"The truth is, that combination of capital for purposes of trade and competition is a very different thing from such a combination of several persons against one, with a view to harm him, as falls under the head of an indictable conspiracy. There is no just cause or excuse in the latter class of cases. There is such a just cause or excuse in the former. There are cases in which the very fact of a combination is evidence of a design to do that which is hurtful without just cause—is evidence—to use a technical expression, of malice. But it is perfectly legitimate, it seems to me, to combine capital for all the mere purposes of trade for which capital may, apart from combination, be legitimately used in trade."

(1) [1898] A. C. 1.
(2) *Ibid.* p. 131.
(3) *Ibid.* p. 132.
(4) [1892] A. C. 25.
(5) 23 Q. B. D. p. 617.

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Lord Bowen then puts some supposititious cases, and asks would they be indictable conspiracies. It will be observed that he is dealing with the law of conspiracy in this part of his judgment, and with nothing else. He is not dealing with such isolated actions of individuals as would be actionable. I know that in another part of his judgment he says a wrongful act counts as an infringement of a legal right; but he is dealing here with combinations which would be criminal; and he is looking for the test of unlawfulness. He continues—

"In cases like these, where the elements of intimidation and molestation, or other kinds of illegality to which I have alluded, are not present, the question must be determined by the application of the test I have indicated."

What test was that? The test referred to by Lord Bowen, in his language which I have already quoted, is, Was there "a combination of several persons against one with a view to harm him?"

If this is the true test—and what higher authority can we have than Lord Bowen's—is it not the very thing *in its narrowest view* (I am careful to use the expression "in its narrowest view") which the jury found to exist in this case, namely, a combination by the several defendants against one person, Leathem, with a view to injure him?

Let me quote the very words of Lord Justice Fitz Gibbon—

"I told the jury" (reports the learned Lord Justice) "that they must be satisfied that there had been a conspiracy, a common intention, and a combination, on the part of the defendants to injure the plaintiff in his business; and that acts must be proved to have been done by the defendants, in furtherance of that intention, which had inflicted actual loss upon the plaintiff in his trade."

Analyse this direction. What are the conditions of responsibility that it lays down? They are—(*a*) a common intention and a combination to injure an individual; (*b*) acts done in furtherance of that intention; (*c*) loss and damage resulting from those acts. Taking the direction of the Judge and the finding of the jury—reading the findings by the light of the direction—those conditions, at least, were found by the jury to exist. I say "at least," because I think considerably more was found by the jury, as I will show when I examine the finding of the jury and the

instructions of the learned Lord Justice more fully. But let me again revert to the test laid down by Lord Bowen, namely, "Was there a combination of several against one to do him harm?" Was not this the very test that was laid down in *The Mogul Steamship Company* v. *M'Gregor* (1) in the House of Lords? and was it not by reason of the non-existence of the conditions that this test required that the Lords held that what was complained of in *The Mogul Steamship Company* v. *M'Gregor* (1) was not actionable? As I have already said, *The Mogul Steamship Company's Case* (1), which was a case of conspiracy, should never be lost sight of in the present case—not merely because it was a case of conspiracy, but because, when the Lords were pressed in *Allen* v. *Flood* (2) with the test and views stated by those of their body in *The Mogul Steamship Company* v. *M'Gregor* (1), they "put aside the case of conspiracy as anomalous in more respects than one."

I wish again to revert to the language of Lord Justice FitzGibbon. He stated "that the acts should be done in furtherance of an intention to injure an individual." This is most important, because there is a clear distinction between acts which, though done in furtherance of the interests of the persons who do the acts, yet incidentally injure others, and acts the paramount and operative motive of which is to do injury to others.

Too much attention cannot be bestowed upon this distinction.

Let me return to Lord Justice Bowen's judgment in *The Mogul Steamship Company* v. *M'Gregor* (1). He says (3):—

"Then comes the question was what was done with or without just cause or excuse? If it was *bona fide* done in the use of a man's own property, in the exercise of a man's own trade, such legal justification would, I think, exist not the less because what was done might seem to others to be selfish or unreasonable: see the summing up of Erle, J., in the judgment of the Queen's Bench in *Reg.* v. *Rowlands* (4). But such legal justification would not exist when the act was merely done with the intention of causing temporal harm without reference to one's own lawful gain, or the lawful enjoyment of one's own rights. The good sense of the tribunal which had to decide would have to analyze the circumstances, and to discover on which side of the line each case fell. But, if the real object was to enjoy what was one's own, or to acquire for one's self some advantage in one's property or trade, and what was done

(1) [1892] A. C. 25.
(2) [1898] A. C. 1.
(3) 23 Q. B. D. 618.
(4) 17 Q. B. 671.

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was done honestly, peaceably, and without any of the illegal acts above referred to, it could not in my opinion properly be said that it was done without just cause or excuse. One may with advantage borrow for the benefit of traders what was said by Erle, J., in *Reg.* v. *Rowlands* (1), of workmen and of masters:—'The intention of the law is at present to allow either of them to follow the dictates of their own will with respect to their own actions, and their own property; and either, I believe, has a right to study to promote his own advantage, or to combine with others to promote their mutual advantage.'"

This is the language of Lord Justice Bowen. Lord Justice Fry, though he is not as explicit as Lord Justice Bowen, seems to me to have entertained the same opinion. He says (2):—

"I will only add on this part of the case that the charge of Erle, J., in the case of *Reg.* v. *Rowlands* (3), draws the same distinction which I have taken between combinations to promote the interests of those who combine, and combinations of which the hurt of another is the immediate purpose."

Again I wish to observe that Lords Justices Bowen and Fry were in these observations dealing with the law of conspiracy. They were not dealing with what I have referred to before as the isolated actions of individuals. They were not dealing with the proposition decided in *Allen* v. *Flood* (4). They were dealing with combinations having, to use a felicitous expression of Lord Morris in *The Mogul Steamship Company's Case* (5), for their "motive object," the harm, and injury of another.

This distinction seems to me to run through the judgment of several of the Lords in *The Mogul Steamship Company* v. *M'Gregor* (5). Certainly, it is to be found in the opening passage of Lord Bramwell's judgment, which was read and approved of by Lord Macnaghten. He said, when deciding against the plaintiffs in that case, that they did not complain

"Of any act, the ultimate object of which was to injure the plaintiffs, having its origin in malice and ill-will to them."

There is afterwards in his judgment the all-important passage as to the effect of combination—as to the distinction between acts

(1) 17 Q. B. 671, 687, note.
(2) 23 Q. B. D. p. 625.
(3) 17 Q. B. 671.
(4) [1898] A. C. 1.
(5) [1892] A. C. 25.

done by one and by several in combination (1), which has been already referred to by my brother Andrews. See also the passage in the judgment of Lord Morris in the same case (2), where he says:—

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"I entertain no doubt that a body of traders, whose motive object is to promote their own trade, can combine to acquire, and thereby so far to injure, the trade of competitors, provided they do no more than is incident to such motive object, and use no unlawful means."

Lord Field said (3):—

"No doubt there have been cases in which agreements to do acts injurious to others have been held to be indictable as amounting to conspiracy, the ultimate object or the means being unlawful, although, if done by an individual no such consequence would have followed; but I think that in all such cases it will be found that there existed either an ultimate object of malice or wrong, or wrongful means of execution involving elements of injury to the public, or at least negativing the pursuit of a lawful object."

I would also refer to the language of Lord Hannen in the last two pages of his judgment (4). He makes, amongst others, some instructive observations as to the effect of combinations in the case of trades unions which, I think, should be borne in mind when we are considering the effect of the state of terrorism created by the denunciation of the penalty of starvation against those who worked for the plaintiff Leathem.

My brother Andrews has referred to that passage in Lord Halsbury's judgment in *The Mogul Steamship Company* v. *M'Gregor* (5), in which he observes upon Lord Coleridge's criticism upon Lord Bramwell's, I may say, historical charge in the *Queen* v. *Druitt* (6). Lord Halsbury, says:—

"I am unable to concur with the Lord Chief Justice's criticism (if its meaning was rightly interpreted, which I very much doubt) on the observations made by my noble and learned friend Lord Bramwell in *Reg.* v. *Druitt* (6), if that was intended to treat as doubtful the proposition that a combination to insult and annoy a person would be an indictable conspiracy. I should have thought it beyond all doubt or question that such a combination would be an indictable misdemeanour; and I cannot think the Chief Justice meant to throw any doubt upon such a proposition."

(1) [1892] A. C. pp. 44, 45.
(2) *Ibid.* p. 50.
(3) *Ibid.* p. 53.
(4) [1892] A. C. pp. 59, 60.
(5) *Ibid.* p. 38.
(6) 10 Cox, Cr. Cas. 592.

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If a combination to insult and annoy a person is an indictable misdemeanour, one would say that a combination to injure him, to inflict loss and damage on him, by depriving him of the means by which he earned his livelihood, is also an indictable misdemeanour.

But now let me put what seems to me rather a common sense view. Were it not for the decision in *Allen* v. *Flood* (1) we would, I think, all of us be immediately unanimous that, having regard to all the evidence in this case, the verdict should stand. Why should we not now allow it to stand when the Lords, or rather the majority of the Lords, whose judgments constituted the decision in *Allen* v. *Flood* (1), have told us that the case of conspiracy was put aside as a thing anomalous in more respects than one? Why should we say it is conclusive of a case of conspiracy when the Lords expressly told us it was not?

In my humble judgment, as far as Ireland is concerned, we should allow the law of conspiracy to remain as it has hitherto been administered in cases relating to trade. I should not perhaps say "so far as Ireland is concerned." I should say "so far as this Court is concerned," because, if the case goes to the Court of Appeal, it will be altogether of course for that Court to determine what course should be pursued.

But now let me come to the learned Lord Justice's charge more *in extenso*, and let me see what he told the jury. My Lord Chief Baron has stated that, if the jury had found that what was done was not done in contemplation and furtherance of a trade dispute, or had found that coercion or intimidation was used, he would agree with us. He has stated there was evidence of coercion and intimidation, but that he is of opinion that it was not submitted to the jury by the learned Lord Justice. I am of opinion that the learned Lord Justice did submit the question of coercion and intimidation to the jury, and that the jury, by their finding, negatived that the defendants' action was in contemplation and furtherance of a trade dispute, and that, having regard to the direction of the learned Judge, and the evidence, and the form of their finding, they must be taken to have affirmed the existence of coercion and intimidation. If either of two things was established,

(1) [1898] A. C. 1.

it is, I think, conceded that the verdict must stand—(*a*) that it was negatived that the action of the defendants was in contemplation or furtherance of a trade dispute; (*b*) that the employment of coercion was affirmed by the jury.

What then, says the learned Lord Justice?—

"Upon the meaning of the words 'wrongfully and maliciously' in the question, I told the jury that they had to consider whether the intent and actions of the defendants went beyond the limit which would not be actionable, namely, securing or advancing their own interests, or those of their trade, by reasonable means, including lawful combination, or whether their acts, as proved, were *intended* and calculated to injure the plaintiff in his trade, through a combination, and with a common purpose, *to prevent the free action* of his customers and servants in dealing with him, and with the effect of actually injuring him, as distinguished from acts legitimately done to secure or advance their own interests."

Let me stop here and take the first question put to the jury and read it by the light of this instruction. The first question was, "Did the defendants, or any of them, *wrongfully* and *maliciously* induce the customers or servants of the plaintiff named in the evidence to refuse to deal with the plaintiff?" Answer, "Yes."

Having regard then to the instruction, what did they find by this? They found, in my opinion, that the defendants conspired to coerce the customers and servants of the plaintiff not to deal with him, and had coerced them not to do so—that they did this in order to injure the plaintiff—that is to say, that the motive object of their conspiracy was to injure the plaintiff, and that the means they used were coercion. We must hold that the finding was upon the basis of the instruction. Why do I use the word "coercion?" For this reason, because the learned Lord Justice used the words "to prevent the free action." I especially point to the word "free," for if freedom of action is prevented what else is there but *coercion*?

Let me now turn to the charge in *Allen* v. *Flood* (1). Lord Macnaghten tells us what it was (2):—

"There was not, as the learned Judge said, a shred of evidence of any conspiracy at all; then there was a charge of intimidation and coercion. That

(1) [1898] A. C. 1. (2) [1898] A. C. p. 148.

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charge vanished, too. The only reference the learned Judge made to it was to say, 'There is no evidence here of course of anything amounting to intimidation or coercion in any legal sense of the term.'"

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How very different this is from the language of Lord Justice FitzGibbon, because, in my opinion, if there was that conspiracy "to prevent the free action of others," to which the learned Lord Justice referred, it is clear that there was a conspiracy to coerce others. I entirely agree with my Lord Chief Baron that there was evidence in this case of coercion and intimidation proper to be submitted to the jury. I think there was not alone evidence of coercion, but that there was evidence of intimidation. Take, again, but even a portion of what took place in the public house—well-called a public house, being the most public place the meeting could be held in at night time. The plaintiff Leathem went there on his own behalf, and on behalf of his men. What a result he had to convey to them! A denunciation of compulsory starvation, worse than a threat of immediate physical violence. A year's compulsory starvation is a year of physical suffering, and, if one's children suffer, the mind suffers more than the body. Of course this denunciation produced an atmosphere of terrorism amongst those who were willing to have any trade connection with Leathem. It was a direct attempt also to coerce and terrorise himself. This meeting, taken as a whole, was an overt act of violence and denunciation and coercion. What would Lord Bramwell say of all this? Read what I have described as his historical charge in *The Queen* v. *Druitt* (1), every line of which is important. I will quote one passage only:—

"Still" (said he), "if any set of men agreed amongst themselves to coerce that liberty of mind and thought by compulsion and restraint, they would be guilty of a criminal offence, namely, that of conspiracy against the liberty of mind and freedom of will of those towards whom they so conducted themselves."

He was referring to coercion or compulsion, something that was unpleasant and annoying to the mind operated upon; and he laid it down as undoubted law that, if two or more persons agreed

(1) 10 Cox, Cr. Cas. 592.

that they would by such means co-operate together against that liberty, "they would be guilty of an indictable offence." I point to the words, "something annoying or unpleasant to the mind operated upon"; and I ask, Was not the act of holding up a picture of compulsory starvation of faithful servants and their families a thing unpleasant and annoying to the mind of the employer and employees? It is to be remarked that it was when Leathem said "that it was a hard thing to make a man walk the streets with nine small children, and that he would not submit to it," that the resolution to call out his assistants was passed.

I will now proceed to another passage in the charge of the learned Lord Justice. We are all, I believe, agreed that the learned Lord Justice was substantially right in the way in which he dealt with the "black lists." But I come to the question whether the acts were done in contemplation or furtherance of a trade dispute. I quote again the language of the learned Lord Justice:—

"Finally" (he says), "I told the jury that the acts done with the object of increasing the profits or raising the wages of any combination of persons, *such as the society to which the defendants belonged*, whether employers or employed, by reasonable and legitimate measures, were perfectly lawful, and were not actionable so long as no wrongful act was maliciously—that is to say, intentionally—done to injure a third party. To constitute such a wrongful act for the purposes of this case, I told the jury that they must be satisfied that there had been a conspiracy—a common intention and a combination on the part of the defendants—to injure the plaintiff in his business; and that acts must be proved to have been done by the defendants in furtherance of that intention, which had inflicted actual money loss upon the plaintiff in his trade. Whether the acts of the defendants were in that sense actionable was a question which I told the jury they had to try upon the evidence. At the conclusion of my charge, at the request of Mr. O'Shaughnessy, Q.C., for the defendants, I divided the single question into the written question which I submitted to the jury as above stated."

Now what is the meaning of all this? Was it not a trades union case, and was not the learned Lord Justice instructing the jury as to what the members of a trades union may lawfully do, or might not lawfully do? Can they be said to be acting in contemplation or furtherance of a trade dispute when their motive object is the injury of an individual? It is, as I have pointed out

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more than once before, a wholly different thing if, their motive object being the promotion of their own interests, loss and damage results to a third party from the pursuit of their own interests.

On this point, I may refer again to the charge of Mr. Justice Erle, in the *Queen* v. *Rowlands* (1). It is true that that charge was delivered before the Act of 1875 was passed; but as I have already observed, Lord Bowen and Lord Justice Fry, long after the passing of that Act, referred to Mr. Justice Erle's charge with approval. Mr. Justice Erle said :—

"The law is clear that workmen have a right to combine for their own protection, and to obtain such wages as they choose to agree to demand . . . I make that remark because a combination for the purpose of injuring another is a combination of a different nature, directed personally against the party to be injured; and the law, allowing them to combine for the purpose of attaining a lawful benefit for themselves, gives no sanction to combinations which have for their immediate purpose the hurt of another."

Why, this is the very proposition laid down in so many words by Lord Bowen in the *Mogul Steamship Co.* v. *M'Gregor* (2), and it is to be remembered that, on motion for a new trial in the *Queen* v. *Rowlands* (3), this proposition was affirmed as correct law not only by Mr. Justice Erle, but by Lord Campbell and Mr. Justice Patteson.

I know my Lord Chief Baron sought to distinguish this case in *Kearney* v. *Lloyd* (4); but I think the proposition laid down by Mr. Justice Erle was a general proposition irrespective of the particular Act of Parliament referred to. It seems to me that, on the new trial motion, the only distinction was the one to which I have been adverting, namely, the distinction between acts, the immediate purpose of which was injury to an individual, and acts that might incidentally cause injury to an individual. This seems to me to have been the view of Lord Bowen and Lord Justice Fry, and Lord Bramwell's view in the *Mogul Steamship Company* v. *M'Gregor* (2) in the House of Lords.

Mr. Justice Erle proceeds :—

"The rights of workmen are conceded, but the exercise of a free will and freedom of action is also secured equally to the masters."

(1) 17 Q. B. 671.
(2) [1892] A. C. 25.
(3) 17 Q. B. p. 687, note.
(4) 26 L. R. Ir. 268.

It is mockery to speak of free will and freedom of action in a case where the penalty of walking the streets and starvation is pronounced against those who claim to exercise those rights. In my judgment, not only is it negatived that what was done was done in contemplation of a trade dispute, but a conspiracy to coerce, and the existence of coercion and intimidation, are established.

The Lord Chief Baron rests his judgment altogether upon the third section of the Trades Union Act of 1875. Now this Act was not even glanced at in the *Mogul Steamship Company* v. *M'Gregor* (1), or in *Allen* v. *Flood* (2); nor did I understand the view presented by my Lord Chief Baron to have been advanced at the bar. This, indeed, is no conclusive reason why this view, presented with so much subtlety and force, is not an absolutely sound one. However, having given the argument the best consideration I could, I find myself unable to adopt it. The words of the section upon which he relies are as follows:—

"An agreement or combination by two or more persons to do or procure to be done any act in contemplation or furtherance of a trade dispute between employers and workmen shall not be indictable as a conspiracy if such act committed by one person would not be punishable as a crime."

My Lord Chief Baron says that every actionable conspiracy imports criminality, and that, if it is not criminal, it is not really a conspiracy, and is not actionable. This may be so. The Lord Chief Baron has cited several passages from learned judgments to show that it is so; and I am not to be taken as denying the correctness of the proposition; but what are the words of the Act of Parliament? The third section of the Act of 1875 says that the agreement "shall not be indictable as a conspiracy." This would seem to me to leave untouched the essential nature of the conspiracy, but to exempt the parties from punishment by declaring that the agreement shall not be indictable; but, however this may be, I am very clear that what the defendants did here, having regard to the finding of the jury, was not done at all in contemplation or furtherance of a trade dispute. It was not an honest calling out of union workmen in the *bona fide* assertion of trades

(1) [1892] A. C. 25. (2) [1898] A. C. 1.

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union interests. The action here complained of, as the jury found on sufficient evidence, was a wreaking of vengeance on the plaintiff Leathem. My Lord Chief Baron has said that if the jury had found that what was done was not in contemplation or furtherance of a trade dispute, he would have agreed with the other members of the Court; but I think that it is absolutely plain that they did so find, having regard to the instruction of the learned Judge, a most plenary and accurate instruction.

I wish to add a few observations with reference to the case of *Kearney* v. *Lloyd* (1). I agree in what my brother Andrews, who tried the case, said with reference to it. It seems to me that a more grotesque application of the law of conspiracy was never attempted. The Protestant parishioners of a certain parish voluntarily combined amongst themselves to get rid of a clergyman who actually indulged in personal references from the pulpit. So far from their conduct being unlawful, it was in my judgment righteous. But the importance of the case is derived from certain principles laid down by my Lord Chief Baron; and, indeed, anything he says has almost a coercive sanction for me. But, before I come to the principle enunciated by my Lord Chief Baron, let me say that there is evidence of coercion and intimidation in this case which, of course, plainly distinguishes it. There is also another ground of distinction. This is a case affecting trade, and such a case is left untouched in *Kearney* v. *Lloyd* (1). Perhaps I am wrong in saying untouched, because my Lord Chief Baron intimated an opinion that the case affecting a man's trade would be different, and he seems to have distinguished Lord Bowen's view on that ground. Indeed, the law of conspiracy has been administered in this country on the basis that a conspiracy, the direct and immediate purpose of which was to do injury to a man in his trade, is an indictable conspiracy.

However, my Lord Chief Baron undoubtedly laid down that an action for a conspiracy to injure is not maintainable unless the word "injury" and "injured" be read in their strict legal sense as the infringement of some strict legal right vested in the plaintiff.

(1) 26 L. R. Ir. 268.

If the determination of this case rested upon the decision in *Kearney* v. *Lloyd* (1) it would, in this Court, be my duty to follow that decision, though I consider it opposed to the view of Lord Bramwell in *The Mogul Steamship Company* v. *M'Gregor* (2), where he refers to "acts the ultimate object of which was to injure the plaintiff, having its origin in malice and ill-will to them"; and where he employs the remarkable language as to the effect of combination (3) to which I have already referred. Lord Bramwell's judgment was read and approved of by Lord Macnaghten, and the language was quite general, not confined to cases in restraint of trade. It will be remembered that when *Kearney* v. *Lloyd* (1) was decided, the *Mogul Steamship Company's Case* (2) had not reached the House of Lords, and the Lord Chief Baron decided *Kearney* v. *Lloyd* (1) on the then weight and balance of authority.

In my opinion, if a conspiracy, originating in malice, and having for its object and immediate purpose the hurt and damage of an individual, is not actionable, when loss and damage result to an individual from acts done in pursuance and furtherance of such a conspiracy, and of an intention to do harm and injury to an individual, intolerable suffering can be inflicted without redress, the ruin of individuals can be effected, whilst malicious combinations, whose direct object is to inflict that ruin, and which have succeeded in doing so, enjoy an absolute impunity.

No point has been made on the pleadings. If they were defective, according to the settled practice of the Irish Courts we should amend them so as to make them consistent with the findings.

I think the verdict is sustainable on many grounds. The costs should of course follow the result. This would appear to be specially reasonable in a case in which the defendants did not think fit to appear in the witness box, and where the Judge approved of the verdict.

A. E. R. J.

(1) 26 L. R. Ir. 268.
(2) [1892] A. C. 25.
(3) [1892] A. C. 25, pp. 44, 45.

Appeal. 1899.

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Jan. 17, 18, 19, 23 May 2.

The defendants appealed (1).

O'Shaughnessy, Q.C., Campbell, Q.C., Macinerney, Q.C., and *W. M'Grath*, for the appellants:—

This was merely a trade dispute, and the defendants were therefore entitled to insist that none but members of their Union should be employed. If the object of the defendants was to benefit themselves and their own trade, and not to damage the plaintiff, there is no cause of action: *Mogul Steamship Company* v. *M'Gregor, Gow & Company* (2). At the date of the trial the decision of the House of Lords in *Allen* v. *Flood* (3) had not been pronounced, and *Temperton* v. *Russell* (4) was the leading authority till then. Inducing persons not to enter into contracts, when done maliciously, and with intent to injure, was decided in *Temperton* v. *Russell* (4) to be as actionable as inducing persons to break valid and subsisting contracts. A conspiracy to induce persons not to enter into the former was held sustainable in *Temperton* v. *Russell* (4), because there was an invasion of a legal actionable right. The House of Lords have held in *Allen* v. *Flood* (3) that inducing persons not to enter into a contract is not an invasion of a legal right, and gives no cause of action. They have gone to the root of the decision in *Temperton* v. *Russell* (4), with the result that if the combination or conspiracy is to do a legal act, *i. e.* an act not amounting to the invasion of a legal right of the individual it is not actionable.

The second proposition in *Temperton* v. *Russell* (4) is overruled. Even though the act complained of was done by several individuals and not by one, as in *Allen* v. *Flood* (3), the action is not maintainable: *Kearney* v. *Lloyd* (5).

No damage whatever was proved. The plaintiff had not any contract with Munce capable of being enforced: he was merely in the habit of dealing with the plaintiff. The bare fact that a man deals with one shop for particular goods for some time forms no ground for the inference of a contract to continue to do so.

(1) In the Court of Appeal before LORD ASHBOURNE, C., PORTER, M. R., and WALKER, and HOLMES, L.JJ.

(2) [1892] A. C. 25.

(3) [1898] A. C. 1.

(4) [1893] 1 Q. B. 715.

(5) 26 L. R. Ir. 268.

The injury, if there was any, was not to Leathem, but to his customers, because they could not get their butcher meat so cheap elsewhere.

Serjeant Dodd, *Gordon*, Q. C., and *James Chambers*, for the respondent :—

This was not a trade dispute. There was no quarrel between Munce and his men, nor between Leathem and his men, nor yet between Munce and Leathem. Pressure was put upon Munce to do an act which injured the plaintiff, while it did not benefit himself, and he did it against his will. There was intention to injure the plaintiff for something he had done in the past, and there was also a conspiracy to induce others to break their contracts with the plaintiff. There is evidence of injury to the plaintiff in two particulars, the strike of the plaintiff's men and the breaking of the contract by Munce. The plaintiff has proved both branches of illegal conspiracy :—1, a conspiracy to do an unlawful act; or, 2, a conspiracy to do a lawful act in an unlawful way. *Reg.* v. *Druitt* (1) decided that picketing was illegal, because it was an illegal mode of carrying out a legal object. The Act 37 & 38 Vict. c. 86, was passed, by sect. 3 of which it was enacted that "an agreement or combination by two or more persons to do or procure to be done any act in contemplation or furtherance of a trade dispute between employers and workmen shall not be indictable as a conspiracy, if such act committed by one person would not be a punishable crime." Since that Act the principle of *Reg.* v. *Druitt* (1) is not applicable to trade disputes. *The Mogul Steamship Company* v. *M'Gregor, Gow & Company* (2) was simply a case of a trading Company endeavouring to advance their own interests. It is actionable for one person to cause others to break their contracts, and it is also actionable to cause persons not to enter into contracts: *Temperton* v. *Russell* (3), *Lyons* v. *Wilkins* (4). What may be lawful for a single individual may be unlawful for a number of persons to do together: *Kearney* v. *Lloyd* (5). There

(1) 10 Cox, Cr. Cas. 592.
(2) [1892] A. C. 25.
(3) [1893] 1 Q. B. 715.
(4) [1896] 1 Ch. 811.
(5) 26 L. R. Ir. 268.

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was no conspiracy in *Allen* v. *Flood* (1), and the House of Lords did not deal with the question of conspiracy.

Then as to the question of damages. Once the jury have given a verdict with the whole case before them the Court will not interfere, if there was any evidence of damage. Damages may be given for inducing a servant to leave his employer: *Gunter* v. *Astor* (2).

May 2.

LORD ASHBOURNE, C. :—

This is an action instituted by Mr. Leathem, a flesher or butcher of Lisburn, against five fleshers' assistants and members of the Journeymen Butchers Assistants' Association, to recover damages for maliciously and wrongfully procuring certain persons to break contracts into which they had entered with the plaintiff, and not to enter into other contracts with the plaintiff; and for maliciously and wrongfully enticing and procuring certain workmen in the employment of the said persons to leave the service of their employers, and to break their contracts of service with intent to injure the plaintiff, and to prevent the said persons from carrying out their contracts with the plaintiff; and for maliciously and wrongfully intimidating the said persons, and coercing them to break their contracts with the plaintiff, and intimidating the servants in their employ, and coercing them to leave the service of their employers; and for unlawfully conspiring together, and with certain other persons, to do the acts aforesaid with intent to injure the plaintiff.

The case was tried at the Summer Assizes of 1896, at Belfast, before Lord Justice Fitz Gibbon, and resulted in a verdict for the plaintiff. The Queen's Bench Division (Palles, C.B., dissenting) has upheld that verdict, and the defendants have brought the case before this Court on appeal.

The facts of the case are few and simple, and can be stated very shortly. The plaintiff offended the defendants by employing some men not members of the defendants' Association, and refused to dismiss them when requested. The plaintiff appears to have tried to come to an amicable agreement with the defendants' Association, and attended a meeting of theirs, where he practically

(1) [1898] A. C. 1. (2) 4 Moore, 12.

offered to pay the dues and charges requisite to have his non-union men admitted to the Association, and thus remove the sole ground of trade dispute. In his evidence he says: "Shaw objected, and said my men should be put out and walk the streets for twelve months. I said it was a hard case to make a man with nine small children walk the streets for twelve months, and that I would not submit to it." The defendants then called out the plaintiff's union assistants, and induced one of them to break his contract of service, thus causing possibly some inconvenience to the plaintiff, though not much loss, as labour appears to have been abundant in the neighbourhood.

The plaintiff, however, alleged a much graver element of loss, in the successful efforts of the defendants to prevent his customers dealing with him. Some evidence was given as to three, but attention may be concentrated on one. His principal customer appears to have been a Belfast butcher called Munce, who had dealt with him in a very large way for a great number of years. The course of dealing between them was that the plaintiff delivered a very extensive consignment of meat every week to Munce, which was invariably paid for in due course. The defendants determined to "put a screw" on Munce to withdraw his custom from the plaintiff, and he, yielding to a threat that his assistants would be otherwise called out, reluctantly telegraphed to the plaintiff to cease sending him meat.

The action of the defendants in reference to Munce was the cause of the most serious loss sustained by the plaintiff, and was the main element of damage proved by him at the trial. Unquestionably, the plaintiff was deprived of his best customer through the action of the defendants. A course of dealing most profitable for the plaintiff was broken owing to their intervention. No formal contract may have existed between the plaintiff and Munce, though possibly one might have been implied from week to week, determinable only by adequate notice. But the real ground of large damage was the driving away of the plaintiff's best customer by the combined action of the defendants, and their deliberate damage to a most lucrative part of his trade. In addition, his name was put on a "black list" under circumstances fully detailed in evidence.

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Lord Justice Fitz Gibbon, in charging the jury, told them to ask themselves the question whether the action of the defendants was or was not taken for the purpose of injuring Leathem in his trade or business, as distinguished from being action for the legitimate advancement of the interest of the men themselves. He pointed out that "maliciously" meant with intent to injure, as distinguished from advancing their own interests. He also told them that in calculating damages they were to consider money injury to the plaintiff in his business; but in considering the amount they were not bound to confine themselves to £ *s. d.* that could be proved.

The learned Lord Justice left three questions to the jury:—First, Did the defendants, or any of them, maliciously induce the plaintiff's customers or servants named in the evidence to refuse to deal, or to continue, with the plaintiff? Second, Did the defendants, or any of them, maliciously conspire to induce the plaintiff's customers and servants not to deal with the plaintiff, or not to continue in his employment, and whether the persons thereby induced did so? Third, Did the defendants Davey, Dornan, and Shaw, or any of them, publish the "black list" with the intention of injuring the plaintiff? The jury answered the first and second questions in the affirmative against all the defendants, assessing the damages at £200; they also answered the third question in the affirmative against the three defendants named therein, assessing the damages at £50. It was conceded in the argument that no separate damages could be given on the third question, and it may therefore be disregarded in the consideration of the case.

The case of *Allen* v. *Flood* (1) had not been decided in the House of Lords at the time of the trial before Lord Justice Fitz Gibbon, and the argument addressed to us substantially amounted to a contention that the decision of the House of Lords had rendered it impossible to uphold the verdict in the present case, and had practically swept away the authority of *Temperton* v. *Russell* (2), on which the plaintiff might have otherwise relied.

The case of *Temperton* v. *Russell* (2) was unquestionably very

(1) [1898] A. C. 1. (2) [1893] 1 Q. B. 715.

like the present in its essential particulars. Its head-note is as follows:—

"The defendants were members of a joint committee of three trade unions connected with the building trade in Hull. A firm of builders there having refused to obey certain rules laid down by the unions with regard to building operations, the unions sought to compel them to do so by preventing the supply of building materials to them. In pursuance of this object they requested the plaintiff, a master mason and builder in Hull, who supplied building materials to the firm, to cease to supply them with such materials, but the plaintiff refused to do so. Thereupon, with the object of injuring the plaintiff in his business, in order to compel him to comply with such request, the defendants induced persons who, to the knowledge of the defendants, had entered into contracts with the plaintiff for the supply of materials, to break their contracts, and not to enter into further contracts with the plaintiff, by threatening that the workmen would be withdrawn from their employ. The plaintiff sustained damage in consequence of such breaches of contract, and of the refusal of such persons to enter into contracts with him:—*Held*, that an action was maintainable by the plaintiff against the defendants for maliciously procuring such breaches of contract, and also for maliciously conspiring together to injure him by preventing persons from entering into contracts with him."

The case was tried before Mr. Justice Collins, and he left the following questions to the jury:—

"1. Did the defendants or any of them maliciously induce the persons named (Brentano, Gibson, and others) or any of them to break the contracts with the plaintiff?

"2. Did the defendants, or any two or more of them, maliciously conspire to induce the persons named and others not to enter into contracts with the plaintiff, and were such persons thereby induced not to make such contracts?"

The jury found for the plaintiff against all the defendants on both heads with £50 damages on the first and £200 damages on the second.

Before considering how far this decision is affected by the judgment of the House of Lords in the case of *Allen* v. *Flood* (1), I should like to refer to the case of *The Mogul Steamship Company* v. *Macgregor & Co.* (2), when the House of Lords laid down what

(1) [1898] A. C. 1.

(2) [1892] A. C. 25.

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could not be charged as a conspiracy to injure. The facts of that case are important.

"Owners of ships, in order to secure a carrying trade exclusively for themselves and at profitable rates, formed an association, and agreed that the number of ships to be sent by members of the association to the loading port, the division of cargoes, and the freights to be demanded, should be the subject of regulation; that a rebate of 5 per cent. on the freights should be allowed to all shippers who shipped only with members; and that agents of members should be prohibited on pain of dismissal from acting in the interest of competing shipowners; any member to be at liberty to withdraw on giving certain notices. The plaintiffs, who were shipowners excluded from the association, sent ships to the loading ports to endeavour to obtain cargoes. The associated owners thereupon sent more ships to the port, underbid the plaintiffs, and reduced freights so low that the plaintiffs were obliged to carry at unremunerative rates. They also threatened to dismiss certain agents if they loaded the plaintiffs' ships, and circulated a notice that the rebate of 5 per cent. would not be allowed to any person who shipped cargoes on the plaintiffs' vessels. The plaintiffs having brought an action for damages against the associated owners alleging a conspiracy to injure the plaintiffs:—*Held*, affirming the decision of the Court of Appeal (23 Q. B. D. 598), that since the acts of the defendants were done with the lawful object of protecting and extending their trade and increasing their profits, and since they had not employed any unlawful means, the plaintiffs had no cause of action."

It will thus be seen that the case of *Temperton* v. *Russell* (1) is very like, whilst *The Mogul Case* (2) is very unlike, the present; but each throws a flood of light on the principles which should guide our decision.

The facts of the case of *Allen* v. *Flood* (3) have been stated so often that it is only necessary to refer to them very shortly. Flood and Taylor, the plaintiffs, were employed as shipwrights by the Glengall Iron Company, on the terms that they might be discharged at any time. The jury found that Allen, the defendant, maliciously induced the Company to discharge Flood and Taylor from the Company's employment and not to engage them, and that each had suffered £20 damages. The case, when finally presented for decision, was not one of conspiracy or unlawful combination.

None of the noble and learned Lords who concurred in the

(1) [1893] 1 Q. B. 715. (2) [1892] A. C. 25. (3) [1898] A. C. 1.

opinion of the majority laid it down that their decision would apply to a case of conspiracy, and several of them expressly guarded themselves against their judgments being quoted as applicable to a case of conspiracy.

Lord Herschell said:—

"I put aside the case of conspiracy."

Lord Macnaghten was careful to state:—

"In order to prevent any possible misconstruction of the language I have used, I should like to add that in my opinion the decision of this case can have no bearing on any case which involves the element of oppressive combination. The vice of that form of terrorism, commonly known by the name of 'boycotting,' and other forms of oppressive combination, seems to me to depend on considerations, which are, I think, in the present case conspicuously absent."

Lord Shand was also very clear:—

"The case was not presented by the learned Judge to the jury as one of conspiracy, and does not raise any question of that kind. Combination of different persons in pursuit of a legitimate trade object occurred in the case of *The Mogul Steamship Company*, and was there held to be lawful. Combination for no such object, but in pursuit really of a malicious purpose to ruin or injure another would, I should say, be clearly unlawful; but this case raises no such question."

Lord Shand also pointed out that the defendant's motive was to further the interest of those he represented, and not to do mischief to the plaintiffs in their lawful calling.

How does the decision of *Allen* v. *Flood* (1) affect the authority of *Temperton* v. *Russell* (2)? How does it necessarily compel us to regard the case as no longer entitled to weight? In my opinion it leaves entirely untouched and unshaken the larger part of that case—that in respect of which £200 damages was awarded for conspiracy.

In the present case the jury has expressly found that the defendants maliciously conspired to induce the plaintiff's customers and servants not to deal with the plaintiff, and not to continue in his service, and that he was damaged thereby to the extent of

(1) [1898] A. C. 1. (2) [1893] 1 Q. B. 715.

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£200. Lord Justice Fitz Gibbon was careful to express what was meant by "maliciously"; and I take it that the jury found and meant that the defendants acted with the motive and intention to injure and punish the plaintiff, and not to advance their own interests, or to further their own trade objects. I am disposed to think that there was evidence of coercion and intimidation; but as the jury did not return any separate finding on the subject, I do not enter on the subject as a separate or independent topic.

The Mogul Steamship Company's Case (1) shows how carefully the law protects all legitimate trade competition, and that the law will not allow it to be interfered with because the combination which is formed for legal purposes is styled a conspiracy. On the other hand the case of *Temperton* v. *Russell* (2) shows that where the elements of a real conspiracy to injure exist, the law will not deny relief to a man who is thereby damaged.

I am unable to concur in the interesting argument founded on sect. 3 of the Conspiracy and Protection of Property Act, 1875. I cannot regard the acts of the defendants as being done in contemplation and furtherance of a trade dispute; and I am also impressed by the argument of Mr. Justice Andrews that the enactment deals with criminal responsibility only, and not with the right of redress for civil wrongs.

I am unable to find anything in the case of *Allen* v. *Flood* (3), as decided by the House of Lords, to apply to a case of conspiracy like the present; I can see nothing to justify our sending the case for a new trial; I think that the verdict for £200 damages should be upheld, and the decision of the Queen's Bench Division for that amount affirmed, and this appeal dismissed with costs.

PORTER, M. R.:—

Henry Leathem, the plaintiff, was, when the action was brought, a butcher, carrying on his trade at Lisburn, and had done so for over twenty years. One of his workmen in the summer of 1895 was named Robert Dickie. The several defendants were members of a trading union called the Journeymen

(1) [1892] A. C. 25. (2) [1893] 1 Q. B. 715. (3) [1898] A. C. 1.

Butchers' Association. A meeting of the association was held on the 8th and 9th July, 1895, in Magill's public-house, Market-square, Lisburn, at which the plaintiff attended in consequence of a letter he had received, and he said that he came on behalf of his men, whom he asked to have admitted as members of the society, plaintiff undertaking to pay all fines, debts, and demands against them. Shaw, one of the defendants, objected to their being allowed to work, or to their admission, and said that they should be put out of plaintiff's employment, and could not be admitted; and that they should walk the streets for twelve months. The plaintiff said it was a hard case to make a man walk the streets with nine small children, and he would not submit to it. Shaw moved, and one Morgan seconded, and it was resolved, that plaintiff's assistants should be called out. The defendant Craig (who was in the chair) said there were others who would suit the plaintiff as well, and picked out some (of course Union men) for the purpose. Plaintiff said they were not suitable for his business, and that he would keep the men he had. Craig then said that the plaintiff's meat would be stopped in Andrew Munce's. Munce was a butcher in Belfast in a large way of business, who for twenty years had been in the habit of purchasing from the plaintiff the finer sorts of meat to the extent of £30 a week, and sometimes over that amount. There was no written contract, "only by word of mouth," between plaintiff and Munce; but the plaintiff by arrangement sent the meat each week, and it was always received and paid for by Munce at an arranged price. As Lisburn is some eight miles distant from Belfast, and meat is so perishable an article that it could not be carted back and forward, or sent by train and delivery van, without sustaining injury and probably much loss, and as on no occasion was delivery refused by Munce, I think the jury would be entitled to infer from twenty years practice that there was a contract, as deposed to by the plaintiff, between the plaintiff and Munce, on the one hand to supply, and on the other to accept, the accustomed amount of meat each week, terminable of course by notice on either side; but, in the absence of notice, continuing;—in other words that Munce would not be justified in refusing to accept the usual weekly supply offered at his door without having given the plaintiff notice of his intention,

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the meat having been killed and prepared for him. At any rate Munce was a very good customer to the plaintiff, and the plaintiff's evidence would support a finding that there was a contract, though not a written one.

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In pursuance of the threat or intimation given by Craig, and given in presence of the other defendants, the defendants turned their attention to Munce; and, after some correspondence, on the 18th September a letter was sent by Davey, the Secretary of the Committee of the Union, to Andrew Munce, stating that a letter received from him was regarded as in the main unsatisfactory, and that "we have no other alternative but to instruct your employees to cease work immediately Leathem's beef arrives." Accordingly, most reluctantly, Munce, because he knew that if he did not do so his men would be forced to strike, had to terminate his long-standing arrangement with Leathem, who thereby directly lost a large part of his established trade, constituting an important part of the good-will of his business, which was his property. In consequence also of the pressure of the defendants, several of the plaintiff's workmen left him, but the only one shown to have broken his contract in so doing was Dickie, who left in the middle of the week.

If the verdict for the plaintiff is to stand no one can say that the £200 awarded as damages is excessive under all the circumstances.

I put aside the £50 found separately on the Black List count. It can only be treated as a part of the cause of action covered by the other claims, and need not have been separately assessed.

The questions submitted to the jury at the close of the case were:—

1. Did the defendants or any of them wrongfully and maliciously induce the customers or servants of the plaintiff named in the evidence to refuse to deal with the plaintiff? *Answer*, Yes.

2. Did the defendants or any two or more of them maliciously conspire to induce the plaintiff's customers or servants named in the evidence, or any of them, not to deal with the plaintiff, or not to continue in his employment, and were such persons so induced not so to do? *Answer*, Yes.

This verdict has been upheld by the Queen's Bench Division (*dissentiente* Palles, C.B.), and we have to consider whether the defendants are entitled to have that finding reversed.

Whether it be actionable or not, there can be no doubt but that the plaintiff has been the victim of very cruel and unjust treatment. He has been guilty of no wrong to anyone. He has carried on a lawful and useful trade, in a lawful and honest manner. For no fault of his own, save that he would not obey the behests of a number of strangers, who had no interest in him or his business, he has been ruined. These behests were that he should dismiss his workmen, who had as good a right to work and to earn their living and that of their families as the defendants had; and when he went to the extreme length of saying that he would submit so far as to pay up all possible pecuniary demands of the defendants' society against the men, as if they had been members originally, and let the men enter the union, he is told that that is not enough: the men must be forced out of his employment, and out of all employment, for twelve months, to show the strength of the combination against them and its power to punish. He would not yield to this; hence the threat to which his principal customer was obliged to yield. It is true that there is no finding as to intimidation or coercion, and we must consider the case as one in which the only facts established by the verdict are that the defendants maliciously (in the legal sense of that word) conspired to induce the plaintiff's customers or servants, or some of them, not to deal with the plaintiff, or not to continue in his employment. If there had been a finding that plaintiff's men, or his customers, had been intimidated, I see no reason why I should have been dissatisfied with it. There is not, however; and the case depends on the second finding, which I have read: though in considering it all the evidence before the jury is relevant.

What, then, had the jury before them? In the first place, there was no dispute or difference between the plaintiff and his workmen when the defendants came to Lisburn and opened the campaign in July, 1895. So far as appears, the men (including Dickie) were satisfied with him. The plaintiff proved in the most conclusive way that he was perfectly satisfied with them. They

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did not want to leave his employment, and he was willing to make sacrifices to retain them. The defendants were not in his service. In the second place, the relations of the plaintiff with Munce were perfectly satisfactory to each, and but for external interference would, no doubt, have so continued. With these relations the defendants had no manner of concern. In the third place, there is no suggestion that the relations of Munce with his own work-people were other than friendly. No complaint came from them. If the defendants had left them alone, no complaint would have come. To each and all of these relations the defendants were strangers.

But it is said they had a legitimate interest in the matter, because they were members of the Journeymen Butchers' Society, and that their combination was in respect of their own interests. Let us see how this hangs together. First, the society (or the defendants) heard that Leathem employs non-union labour, and tries to get him to dismiss his men. Failing in this the defendants, having ascertained that his principal customer is Munce, go to Munce to induce him (using a neutral term) to cease dealing with Leathem. Munce declined at first, and then the threat is held out, that unless he yields his men will be called out on strike. When Munce has to give in, the rest follows, and the object is achieved. But that object is to get Leathem's men, who have not joined the union, thrown out of employment so far as can be managed. The primary object may not have been to injure or ruin Leathem, but it was to be attained by means of that, if necessary. The doing so, if it succeeded and was carried out on a sufficiently large scale, might tend to increase the wages of union workmen; for if all the non-union men were starved out there would be no competitors. But can it be that a conspiracy to ruin Leathem can be justified because it is part of a plan to turn all non-union workmen out of work?

It is said the action of the defendants was protected by the Conspiracy and Protection of Property Act, 1875, section 3 of which provides—"An agreement or combination by two or more persons to do, or procure to be done, any act in contemplation or furtherance of a trade dispute between employers and workmen

shall not be indictable as a conspiracy if such act committed by one person would not be punishable as a crime."

The jury have found the agreement or combination on ample evidence. Was it one in furtherance of a trade dispute? Even if so, there was no dispute between any employer and any workmen that I have heard of. The dispute, if any, was between union and non-union men, though even of it there is only an inference. In my opinion there was no dispute and no contemplated dispute between employer and workman; nor do I think that the defendants have shown any legitimate right to interfere with those whose action they have sought to control. Unless a combination by one-half of the workmen in the realm maliciously to deprive the other half of all employment and means of living be a trade dispute between master and workman, I cannot see that the present case is affected by the Conspiracy Act. If this view be correct, it disposes of the ground-work of a part, at least, of the Chief Baron's very able judgment in this case. The way chiefly suggested in which it could be made to come within the section was by interpreting "dispute between employer and workmen" as including a dispute between an employer (Leathem) and somebody else's workmen (the defendants). I daresay the defendants were workmen working for an employer or employers; but the words of the Act cannot have been meant to apply to such a case. The only other and perhaps more plausible interpretation would be to include a dispute between employers in a particular trade—as a class—and workmen in the same trade—as a class. But while I think that interpretation is legitimate—and it may be sound—I cannot apply it to a case where it is not suggested that any such dispute existed. There was no question of wages, or hours, or terms of hiring. So far as the employer and workmen (plainly correlative terms) before us were concerned perfect harmony prevailed.

Apart from the Act, however, it must be considered, can this action for conspiracy be maintained? and the argument mainly relied upon was that the case of *Allen* v. *Flood* (1) has since the trial of this action decided the contrary.

(1) [1898] A. C. 1

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In that remarkable case a majority of the House of Lords over-ruled the decision of the Court of Appeal. Lord Esher, M.R., in giving judgment, *Flood* v. *Jackson* (1), said—

"It is clear that merely to persuade a person who has contracted to break his contract gives no cause of action at all. But if it is done maliciously, for the purpose of injuring the person to whom the advice is given, or for the purpose of injuring someone else, the person against whom the malice is directed and carried out has a cause of action, not on the ground of the persuasion to break the contract, but on the ground of the malice directed against him. To my mind the result is the same whether the persuasion is to break a contract or not to make a contract."

This proposition in its entirety must be taken to have been over-ruled by the House of Lords; and we are, of course, bound to follow the decision of that tribunal, and to give effect to it in cases where it applies. It does not follow that we should extend it. I have called it a remarkable case. It was decided by a majority of their Lordships' House after two arguments, and after the Judges had been summoned. It over-ruled the unanimous judgment of the Court of Appeal, affirming the ruling of Mr. Justice Kennedy. Of the Judges summoned, six were in favour of affirming, and two of reversing, the decision of the Court of Appeal. Six of the learned Lords were for reversing, and three (including the heads of the law in England and in this country) were for affirming it. Thus, of the judicial minds brought to bear on the case, eight were in favour of, and thirteen against, the decision ultimately arrived at. I allude to this not, I need not say, as in any degree weakening the effect of a judgment of the highest tribunal, but as affording some reason for not pressing it beyond its direct consequences.

I may add that while the Lord Chief Baron in this case thought that it should be submitted to a new trial, he used the remarkable words, speaking of *Allen* v. *Flood* (2)—"In my opinion the law as it existed before that decision is that which is expressed in the masterly judgments of Lord Halsbury, Lord Ashbourne, and Lord Morris"—in other words, the decision in the case has in the Chief Baron's opinion altered the law. I do not remember any

(1) [1895] 2 Q. B. p. 21. (2) [1898] A. C. 1.

more trenchant criticism of a decision of that tribunal, consistent as it is with perfect respect. My meaning in quoting it is merely that it seems to afford an additional reason why a subordinate tribunal ought not to carry the inferences from *Allen* v. *Flood* (1) further than necessary.

Does *Allen* v. *Flood* (1) then rule this case? I think clearly not. It was not a case of combination. Allen, the only defendant, who was left in upon the record after the trial, was dealt with as an individual merely. Three of the learned Lords who constituted the majority, in passages already quoted by the Lord Chancellor, expressly guarded themselves from intending to decide anything which would govern a case of combination. Do we know better than they did what they meant to decide? It is a very long case, and it is not possible to fortify the statement by exhaustive quotation: but the substance there decided was that malicious motive does not of itself render that illegal which otherwise would be legal, except in certain special cases, such as libel, slander, or malicious prosecution. This, however, does not touch the case of conspiracy or combination, and that is the present case.

It has to be considered, then, how the law stands apart from *Allen* v. *Flood* (1). Of that, there can I think be no sort of doubt. I agree entirely with the Chief Baron in that respect, if the most recent and authoritative decisions in England correctly stated the law. The House of Lords may hereafter show that they misconceived it; but till then we are bound to follow them. And indeed no new doctrine is involved in the proposition for which the plaintiff contends: I can conceive of no civilization properly so called in which it could be consistent with the law for a number of persons to band themselves together without any legitimate personal interest, and for sinister objects only to deprive other citizens of the means of living and carrying on their lawful trades and businesses in peace. If there be any such civilized country, it would not be a desirable one to live in. If it be the law that all under its sanction have a right to exercise their lawful callings under its protection, it seems to follow that an organised plan to deprive them of that right must be illegal, and a wrong.

(1) [1898] A. C. 1.

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Alderson, B., in *Hilton* v. *Eckersley* (1), said:—

"It is the privilege of a trader in a free country in all matters not contrary to law to regulate his own mode of carrying it on according to his own discretion and choice."

How, then, can it be lawful for a number of persons, whose power consists in their members and union, to induce by threat of loss (if not by threat of injury or by intimidation which, as I have said, is not found here by the verdict) persons who have trading contracts with traders to break or end them for the malicious motive of depriving them of their right of regulating their trade according to their own discretion and choice?

It will not be questioned that in a certain sense it is unlawful so to do; for if the law gives a right it is not lawful, though in many cases it is not criminal, to invade it. In many cases, and *Allen* v. *Flood* (2) shows an example of one, such conduct if committed by one person is not actionable. The action lies against the person who breaks his contract, and not against him who merely counsels its violation. But when several persons agree, and (in legal language) conspire, to induce such violation from a malicious motive—that is, without lawful justification or excuse)—the case is different. Their agreement becomes an organized attempt to cause a violation of the law, and, in my opinion, may be criminal. It is on this point that it seems to me with reference to some passages in the judgment of the Lord Chief Baron, if I have understood it correctly, the decisions in the *Mogul Case* (3), and in *Temperton* v. *Russell* (4) are of service. The view of the Lord Chief Baron in one passage in his judgment, if I understand it correctly (though from other passages in his judgment I am not quite sure that I do) is that actions founded upon conspiracy, that is criminal conspiracy, when the means employed are not (apart from the fact of combination) criminal, can only be supported when the end to be attained is not merely an unlawful end, but is also criminal. It is, no doubt, the law that an actionable conspiracy must be a criminal conspiracy. The question is whether there may not be a criminal conspiracy to do that which if done

(1) 6 El. & B. 47.
(2) [1898] A. C. 1.
(3) [1892] A. C. 25.
(4) [1893] 1 Q. B. 715

by one person only would not be criminal, and whether the present is not a case of that sort.

Lord Justice Bowen says in the *Mogul Case* (1) :—

"Of the general proposition that certain kinds of conduct not criminal in any one individual may become criminal if done by combination amongst several there can be no doubt. . . . But what is the definition of an illegal combination? It is an agreement by one or more to do an unlawful act, or to do a lawful act by unlawful means: *O'Connell* v. *The Queen* (2), *Reg.* v. *Parnell* (3)."

Commenting on this passage, the Lord Chief Baron says :—

"I suppose it will not be denied that the reference to these cases, *Reg.* v. *O'Connell* (2), and *Reg.* v. *Parnell* (3), shows that 'unlawful,' as used there, meant criminal, and not a violation of a private right."

O'Connell v. *The Queen* (2), and *The Queen* v. *Parnell* (3), do not seem to me to have so laid down the law.

I quote a passage from the charge of Lord Fitz Gerald in the latter case, containing the maturely considered opinion of himself and Lord Justice Barry. The trial of that case lasted nearly a month, and the opinions of the Judges were not hastily formed. It was a great case. Lord Fitz Gerald stated that to ensure perfect accuracy as to what he and his colleague meant, he had written out his views, and he afterwards referred to his manuscript. His statement of the law is therefore of the very highest weight, coming from Judges of such knowledge and experience in every branch of the criminal law. After quoting from *Reg.* v. *O'Connell* (2), and *The Queen* v. *Mulcahy* (4), he says :—

"Mr. Justice Willes, a great lawyer, in laying down the law, says:—'A conspiracy consists in the agreement of two or more to do an unlawful act or to do a lawful act by unlawful means.' Then, gentlemen" (says Lord Fitz Gerald), "what I am about to read is my own commentary on that. By the terms illegal and unlawful it is not intended to confine the definition to an act that would be in itself a crime or an offence; but the law extends to and may embrace many cases in which the purposes of a conspiracy, if done by one only, would not be a criminal act, as for instance if several combined to violate a private right, the violation of which would be wrongful if done by one, though not in itself criminal."

(1) 23 Q. B. D. 616.
(2) 11 Cl. & Fin. 155.
(3) 14 Cox, Cr. Cas. 508.
(4) L. R. 3 H. L. 306.

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He then goes on and gives instances illustrative of this proposition. It is impossible I think to hold that Lord Bowen, citing and relying on this case, can have intended to deny or question the chief proposition on which it depended.

In the present case, if *Reg.* v. *Druitt* (1) is good law, and that is not questioned by anyone, there was an actionable conspiracy in the sense of an indictable conspiracy, unless the law has been altered; for though the means employed in furtherance of the joint design may have been such as in the case of individuals would have been innocent, that is, non-criminal, the end to be attained was when pursued by two or more, criminal and actionable.

Two answers are given to this, on the assumption that *Reg.* v. *Druitt* (1), and similar cases were well decided. The first is that the Conspiracy Act deprives the acts in question of all criminal character, the acts being done in pursuance of a trade dispute. I have discussed this already, and shown, I think, that the Act does not apply to the present case on its admitted facts. But if it did, the acts, though no longer indictable, would not the less remain unlawful, that is contrary to the law, though no longer punishable as crimes. The Act does not purport to deal with questions of civil liability. I cannot think, however, that when the only dispute is between different classes or sets of men who are workmen, the saving of the section in question has any application. A statute altering the common law ought not to be extended beyond its expressed scope and purview.

It was further contended that *Temperton* v. *Russell* (2) is to be treated as over-ruled by *Allen* v. *Flood* (3).

To a certain extent this must be taken to be true. *Temperton* v. *Russell* (2) decided that an action lay for maliciously procuring others to break contracts, and also for maliciously conspiring to injure a person by preventing others from entering into contracts with him. The distinction between maliciously inducing a person to break a contract, and maliciously inducing others not to contract with him is obvious, though till *Allen* v. *Flood* (3) was decided its legal effect was not so manifest. *Allen* v. *Flood* (3) must, I think, be taken to have decided that in a case of that sort the

(1) 10 Cox, Cr. Cas. 592. (2) [1893] 1 Q. B. 715. (3) [1898] A. C. 1.

element of malice is not alone sufficient to give rise to an action. But as to the second proposition, namely, that when there is a conspiracy amongst two or more maliciously to procure actual breaches of contract, *Allen* v. *Flood* (1) makes no pronouncement, and affords no light. On this question, it is satisfactory to find that the matter is left open; and it is to me most satisfactory to know that the opinion of the Lord Chief Baron affords ground for holding, as I do, that apart from the points in which it conflicts with *Allen* v. *Flood* (1), *Temperton* v. *Russell* (2) was well decided, and is in accordance with the law under which we live.

In the present case we have a finding, supported by ample evidence, that the conspiracy was not alone to prevent others from contracting with Leathem, but to induce persons actually to break their contracts with him. Overt acts are shown in the case of Dickie and Munce. It can hardly be argued that the circumstances of the conspiracy embracing further objects, viz. the inducing of persons not to contract with him, would affect its character as legal or the reverse. And, indeed, as matter of common sense it is obvious that the two objects will always be combined. There is no answer attempted as to Dickie, though it is said the measure of damages as to him would be small. As to Munce, it is suggested that if a contract existed it ought to be in writing, though under what section of the Statute of Frauds that contention could be sustained, counsel was not clear. But even if the agreement with Munce was one on which under the Statute of Frauds no action by or against Munce could be sustained, that is not the question. If there is, in fact, a contract (as I have come to the opinion there was), I deny the right of third persons to set up the statute as a defence which Munce never set up, or wished to set up, or dreamt of setting up, as an answer to a charge of maliciously conspiring to induce Munce to break it. It would be a whimsical result if we held that there was an actionable conspiracy, if Munce had among his papers a letter from Leathem—or *vice versa*—showing the terms on which their old trading connection had been carried on, and none, if no such letter existed,

(1) [1898] A. C. 1. (2) [1893] 1 Q. B. 715.

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or could be traced. Those who enter into an unlawful pact of this sort are not entitled to rely on a technicality, which the parties to the agreement have never raised.

I am therefore of opinion that the judgment appealed from is correct, and should be affirmed.

WALKER, L.J. :—

The learned Judge in this case left to the jury two questions, amongst others, which the pleadings properly raised, and which are material on the matters to be decided by us.

1. Did the defendants, or any of them, wrongfully and maliciously induce the customers or servants of the plaintiff named in the evidence to refuse to deal with the plaintiff?

2. Did the defendants, or any two or more of them, maliciously conspire to induce the plaintiff's customers or servants named in the evidence, or any of them, not to deal with the plaintiff or not to continue in his employment, and were such persons induced not so to do? The jury answered both questions in the affirmative, and assessed the damages at £200; and the question which we have to decide is whether there is anything in the decision or the principle of the decision of *Allen* v. *Flood* (1) in the House of Lords which necessitates the setting aside of the verdict found upon the second of those issues.

I leave out of consideration the separate finding and assessment in respect of what has been called the "Black List," which has been eliminated from the case by consent. And, inasmuch as I am of opinion that the verdict for the plaintiff on the second issue should stand, it is unnecessary to consider the effect of the proved inducement to Dickie to break his contract with the plaintiff. This, if it stood alone, would, according to *Bowen* v. *Hall* (2) and *Lumley* v. *Gye* (3), which have never been questioned, support a verdict not necessarily nominal; but, inasmuch as it would be impossible to attribute a verdict for £200 to a cause of action so trifling as the breach in Dickie's case, there should be a new trial.

(1) [1898] A. C. 1. (2) 6 Q. B. Div. 333. (3) 2 El & Bl. 216.

Returning to the second finding, the facts which raise the question are few. The defendants objected as representing their association to the plaintiff employing non-union labour. He tried to meet their views, but they imposed terms apparently most harsh, and he refused to put out his men, and then they proceeded to strike at him through his customers, the principal of whom was Munce. They prefaced their action by a letter of 6th September, stating that if he continued to employ non-union labour "our society would be obliged to adopt extreme measures." The plaintiff had for twenty years been in the habit of supplying Munce weekly with large quantities of meat. There was no written contract, but it was sent weekly and always accepted. A deputation from the defendants' society waited on Munce, and on 18th September, he received a communication from the society that they had "no other alternative but to instruct your employees to cease work immediately Leathem's beef arrives"; and under the influence of that pressure Munce, on the 19th September, wrote to Leathem:—"Unless you arrange with society you need not send any beef this week as my men are ordered to quit work." There are other customers of plaintiff named in the evidence who were approached in a somewhat similar manner, for instance M'Bride and Davis, whose names were put on the lists called "Black Lists," from which the condition of removal was the ceasing to deal with Leathem. It seems to me doubtful whether there was not a contract with Munce which required for its termination reasonable notice, but no question was left to the jury on this point, and I think we must assume for the purpose of upholding the verdict at all events that there was no contract broken by Munce when at the defendants' inducement he refused to deal with the plaintiff any longer. If the case of defendants is well founded every customer the plaintiff had in Lisburn or Belfast could have been similarly compelled to cease dealing with the plaintiff, though there was not a suggestion of a trade dispute between the defendants and any of such customers. There was evidence given of pecuniary damage, which the Lord Justice told the jury was necessary. He told the jury that they had to consider whether the intent and actions of the defendants went beyond the limits which could not be actionable,

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namely, securing or advancing their own interests or those of their trade by reasonable means, including lawful combination, or whether their acts as proved were intended and calculated to injure the plaintiff in his trade through a combination and with a common purpose to prevent the free action of his customers and servants in dealing with him, and with the effect of actually injuring him, as distinguished from acts legitimately done to secure or advance their own interests; and finally he told them that acts done with the object of increasing the profits or raising the wages of any combination of persons such as the society to which the defendants belonged, whether employers or employed, by reasonable and legitimate means, were perfectly lawful, and were not actionable so long as no wrongful act was maliciously, that is to say, intentionally, done to injure a third party. To constitute such a wrongful act for the purposes of the case he told the jury that they must be satisfied that there had been a conspiracy—a common intention and a combination on the part of the defendants—to injure the plaintiff in his business, and the acts must be proved to have been done by the defendants in furtherance of that intention, which had inflicted actual money loss upon the plaintiff in his trade.

Thus the learned Judge contrasts lawful combination with unlawful combination—a combination to protect and further their own interests, with a combination the intent and effect of which were to injure the plaintiff in his trade.

In my opinion a combination or conspiracy to injure or cripple a man in his trade without just cause or excuse, where damage results, was actionable before the decision in *Allen* v. *Flood* (1), and is actionable still.

In *Allen* v. *Flood* (1) the element of conspiracy was disclaimed, and the Peers who delivered the judgment of the majority expressly say that they do not deal with the case of conspiracy. The passages from the judgments have been already referred to.

The case of *Allen* v. *Flood* (1) does decide that an innocent act by an individual is not made unlawful by the allegation or finding

(1) [1893] A. C. 1.

that he did it maliciously; but it leaves untouched cases of the highest authority binding on us, and from which I think the rule can be collected that where a combination exists to do acts calculated and intended to injure a man in his property or trade, where the acts are done without just cause or excuse, and damage results, an action lies.

I think that follows from the decision and discussion in *The Mogul Steamship Company* v. *M'Gregor* (1) in all its stages.

Lord Justice Bowen (2) says:—

"Intentionally to do that which is calculated in the ordinary course of events to damage, and which does in fact, damage another in the other person's property or trade, is actionable if done without just cause or excuse."

Then again he says (3):—

"It is urged, however, on the part of the plaintiffs that even if the acts complained of would not be wrongful had they been committed by a single individual, they become actionable when they are the result of concerted action among several. In other words, the plaintiffs, it is contended, have been injured by an illegal conspiracy. Of the general proposition that certain kinds of conduct not criminal in any one individual may become criminal if done by combination among several there can be no doubt. The distinction is based on sound reason, for a combination may make oppressive or dangerous that which, if it proceeded only from a single person, would be otherwise, and the very fact of the combination may show that the object is simply to do harm and not to exercise one's own just rights."

He then proceeds to consider whether in that case there was not just cause or excuse, and he found nothing but the pressing of trade competition against the plaintiffs, though pressing it to its extremity, and for the purpose of acquiring an advantage in their trade. He held that there was no illegal conspiracy, and therefore no action for the damage resulting from the acts. It will be observed that he treats the conspiracy to be found as a criminal conspiracy.

When this case went to the House of Lords (4) we find the

(1) 21 Q. B. Div. p. 553; 23 Q. B. Div. 613; [1892] A. C. 25.
(2) 23 Q. B. Div. p. 613.
(3) 23 Q. B. Div. p. 616.
(4) [1892] A. C. 25.

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same principle appearing in the judgments of all the Peers. The Lord Chancellor (1) says:—

"My Lords, I do not deny that there are many things which might be perfectly lawfully done by an individual, which, when done by a number of persons, become unlawful. I am unable to concur with the Lord Chief Justice's criticism (2), if its meaning was rightly interpreted, which I very much doubt, on the observations made by my noble and learned friend Lord Bramwell, in *Reg.* v. *Druitt* (3), if that was intended to treat as doubtful the proposition that a combination to insult and annoy a person would be an indictable conspiracy. I should have thought it as beyond doubt or question that such a combination would be an indictable misdemeanour, and I cannot think the Chief Justice meant to throw any doubt upon such a proposition."

That judgment recognizes the authority of a case like *Gregory* v. *Duke of Brunswick* (4), which Lord Justice Bowen also recognized.

Lord Bramwell (5) adopted the view of Sir William Erle, that where the violation of a private right is an actionable wrong, a combination to violate it, if the public has a sufficient interest, is a crime. The case of *Temperton* v. *Russell* (6) is also an authority, because the decision in *Allen* v. *Flood* (7) has not touched the effect of the existence of a conspiracy. I shall not refer to Lord Esher's judgment, which was the one principally questioned; but Lopes, L.J., and Smith, L.J., rest their judgments upon the existence of the conspiracy. The facts of this case, in my opinion, bring it within the principle of all those judgments. There is a combination, the object of which is to cripple and injure a man in his trade, and the acts are done without just cause or excuse. The findings negative the idea of the acts being done merely in furtherance of the interests of the defendants, or from any *bona fide* motive to further a trade dispute between employer and workmen.

That might be a sufficient answer to the argument founded upon the third section of the Conspiracy Act of 1875 (38 & 39 Vict. c. 86).

(1) [1892] A. C. 38.
(2) 21 Q. B. D. 551.
(3) 10 Cox, Cr. Cas. 592.
(4) 6 M. & G. 953.
(5) [1892] A. C. p. 48.
(6) [1893] 1 Q. B. 715.
(7) [1898] A. C. 1.

I express no definite opinion upon the view of Mr. Justice Andrews, that the taking away of the criminal remedy left untouched the right to proceed by civil action.

The case of *Lyons* v. *Wilkins* (1) seems to me an authority binding on us that what was done in the case of Munce was illegal, and not protected by the Conspiracy Act, 1875. There there was a dispute between the plaintiffs and the committee of a trade union, as to the wages given to the plaintiffs' workmen and the system on which they were employed. One Schoenthal was a sub-manufacturer for the plaintiffs, and the committee endeavoured to get Schoenthal to cease work for the plaintiffs, and on his refusing to do so they ordered a strike of his workmen. There was in that case a picketing and besetting of plaintiffs' works, which were in any view unjustifiable; but the point was distinctly raised and decided as to whether what was done in the case of Schoenthal was protected by the Trade Union Acts, and it was held by the three Judges of the Court of Appeal that it was not.

Lindley, L.J., said:—

"Schoenthal's case is one in which it appears to me that the defendants have clearly gone too far, and it is idle to say that their object in doing what they did to Schoenthal was not to compel Messrs. Lyons to do that which the trade union wanted. Schoenthal was the outworker, and what they did was to tell people not to work for him, in order to prevent his working for Messrs. Lyons, and in order to hit Messrs. Lyons through him. That appears to me to be an obvious stretching of the Act which the defendants cannot possibly justify."

Kay, L.J., said:—

"They have no right to prevent anybody working; they have no right to prevent one of his workmen working for him. If they use means to prevent his working, that is not encouraging a strike, but it is doing something far more. If by any means they prevent Schoenthal working for Messrs. Lyons, that is an illegal act. They have conspired together and combined to take means to prevent somebody from working for Messrs. Lyons who otherwise would do so. No Act of Parliament justifies that. It would have been illegal before this Act. There is nothing in this Act which justifies it, and it is illegal still."

(1) [1896] 1 Ch. 811.

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Smith, L.J., said:—

"The procedure which they have adopted as regards Mr. Schoenthal is not authorized by the statute. The particular portion of the statute which in reality authorizes these strikes being promoted or encouraged by trade unions is the 3rd section of the Act of 1875. Now, was there any trade dispute between Mr. Schoenthal's workmen and himself? None at all. If there had been a trade dispute between Mr. Schoenthal's workmen and himself, I apprehend that the trade union might have done as regards Mr. Schoenthal exactly that which they did as regards Messrs. Lyons, and they might have called his men out on strike; but that is not the state of things. There was no dispute between Mr. Schoenthal and his men. What the union did was not done in furtherance of a trade dispute between Schoenthal and his men; but what they did was to call out Mr. Schoenthal's men in order to prevent him from working for Messrs. Lyons, and thus to compel Mr. Schoenthal, who was willing to work for Messrs. Lyons, not to work for them, by depriving him of the men wherewith to work for Messrs. Lyons, and by this means to injure Messrs. Lyons in their trade if they did not obey the edicts of the union. In my judgment that is inadmissible under the Acts of Parliament which I have mentioned, and was illegal, and inasmuch as the acts were clearly intended to, and did, hurt and injure Messrs. Lyons in their trade, they were proceedings which this Court has jurisdiction to stop by injunction when it finds that they have been commenced, and may continue. That strike of the trade union against Schoenthal was, as I have pointed out in my judgment, illegal."

An injunction was granted till the hearing of the cause, and a report of the case on the final hearing is contained in the April number of the Reports, by which it appears that the decision on the injunction motion was affirmed, though no special reference was made to the case of Schoenthal on the point I have been considering.

In the case before us there was no trade dispute between Munce and his workmen. The stopping of Munce's custom was done with the intent of bringing Leathem to his knees in the dispute with him and the defendants, and injuring him in his trade, if he did not obey the edicts of the union. I adopt the language of the Judges I have quoted, that this was inadmissible under the Act of Parliament and illegal. It was no more in furtherance of the trade dispute than if on account of the trade dispute they had cut off the supply of water to Leathem's house.

I concur that the appeal should be dismissed.

HOLMES, L.J. :—

In the summer of 1895 the plaintiff was a butcher carrying on business in the town of Lisburn; and the five defendants were active members of "The Belfast Journeymen Butchers Assistants' Association." The plaintiff had then in his employment some assistants who were not members of that body, and when requested by it to dispense with their services, he declined to do so. In consequence of this, the association resolved that the plaintiff's assistants should be called out; and two of them who were members of the society, having given the notice required by their contract left his service; a third named Dickie, who was not a member, was induced to leave without notice and in breach of his contract, by the promise of a weekly payment out of the funds of the association. It does not appear that the plaintiff had any difficulty in finding suitable men to fill the places of the three who left; and as he did not say that he sustained any pecuniary loss by this transaction, it is impossible to believe that it formed a substantial element in the assessment of damages. Any cause of action that arose therefrom would not justify the award of £200; and if the verdict for this sum cannot be supported on other grounds, it ought to be set aside. I, therefore, turn from this trivial and unimportant part of the case to what was the real subject of complaint.

The Association believing probably that the attempt to withdraw labour from the plaintiff's business would prove an ineffective weapon for their purpose, determined to strike at the business itself by taking away its customers. It appears that a substantial portion of Leathem's trade was the supply of other butchers. A Belfast man, named Munce, had been dealing with him for twenty years. There was no contract in writing between them; but Leathem sent Munce a large quantity of meat every week, delivery of which was invariably accepted; and the payment made therefor in the first nine months of 1895 was over £1000. The society determined to call out Munce's assistants, all of whom belonged to the union, unless he ceased to buy from the plaintiff; and yielding to a threat to this effect conveyed in a letter from the defendant Davey, who was then the secretary of the association,

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Munce, in September, 1895, gave Leathem notice to send him no more meat. From that time until the trial of this action the plaintiff lost Munce as a customer.

There was evidence that the society endeavoured to cause some other butchers who had been in the habit of buying meat from Leathem to cease to deal with him; but although in one instance these efforts were to a certain extent successful, it does not appear that the plaintiff sustained much pecuniary loss thereby; and it may be assumed that the damages awarded by the jury were given in the main for the withdrawal of Munce's custom. Their answers to the questions put to them by the Judge involved a finding that this was brought about by the individual action of each of the five defendants, and a further finding that it was the result of a conspiracy to which all the defendants were parties. The jury were not asked to say whether Munce was induced to break any existing contract between him and Leathem; and I doubt whether, consistently with the evidence, such a question could have been put to them. No doubt, it was possible to infer from their mode of dealing an oral agreement subject to its being determined by reasonable notice that Munce would accept all meat that would be sent to him by the plaintiff from week to week; and the notice given by Munce might well be held unreasonable, at least as regards the consignment of meat then in preparation. But a contract for the sale of goods of the value of £10, or upwards, where there is neither delivery nor part payment, is void without a memorandum or note in writing signed by the parties to be charged or their agents; and Munce would have committed no actionable wrong if he had without previous notice rejected the meat at his own door. In any case the Judge's question was pointed, not to the breach of a contract, but to the customer refusing to deal; and the damages were assessed on this basis. If this does not constitute a good cause of action, the verdict must be set aside; but as the plaintiff would still be entitled to claim damages, not necessarily nominal, for inducing Dickie to break his contract of service, the result would be an order for a new trial.

In considering the questions in issue, one cannot fail to be

struck by the resemblance between this case and *Temperton* v. *Russell* (1). The plaintiff in that action had incurred the hostility of three trades union societies represented by the defendants, on account of his selling building materials to a firm of builders who had refused to be bound by the rules of the society. The hostile feeling that existed led the defendants to advise the societies to refuse to work for any builder upon goods bought by him from the plaintiff; and a builder called Brentano, who had entered into a contract with the plaintiff for the purchase of materials, was induced by the fear that this advice would be acted on to break a contract that he had already made with the plaintiff, and to withdraw his future custom. The jury found—1, that the defendants maliciously induced Brentano and others to break their contracts with the plaintiff; and 2, that the defendants maliciously conspired to induce Brentano and others not to enter into contracts with the plaintiff, whereby such persons were, as a matter of fact, induced as aforesaid. Damages were assessed at £50 on the first finding, and at £200 on the second. Judgment for both sums was upheld in the Court of Appeal; and it is clear, if the Court was right in acting on the verdict for £200, the verdict in the present case for £200 cannot be set aside. The evidence against Craig and his co-defendants was stronger than it was against Russell and his co-defendants. The second question put by Fitz Gibbon, L.J., to the jury was substantially identical with that by put by Collins, J.; and the damage caused to Leathem by Munce ceasing to deal with him, was apparently as great as that which Temperton sustained from the loss of Brentano's future custom.

Temperton v. *Russell* (1) is therefore precisely in point; and unless it has been already over-ruled, or this Court is prepared to over-rule it now, the plaintiff is entitled to retain his judgment for £200. The case presented by the defendants' counsel is, that the decision in *Temperton* v. *Russell* (1) is inconsistent with the judgment of the Lords in *Allen* v. *Flood* (2). I hope to show that there is absolutely nothing in what was either said or decided in *Allen* v. *Flood* (2) opposed to the judgment given by the Court

(1) [1893] 1 Q. B. 715. (2) [1898] A. C. 1.

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of Appeal in *Temperton* v. *Russell* (1) on the second cause of action.

No doubt there are observations of Lord Esher that must now be disregarded. Referring to the distinction taken between the claim for inducing persons to break contracts already made, and that for inducing persons not to enter into contracts, he says :—

"I do not think that distinction can prevail. There was the same wrongful intent in both cases, wrongful because malicious. There was the same kind of injury to the plaintiff. It seems rather a fine distinction to say that where a defendant maliciously induces a person not to carry out a contract already made with the plaintiff and so injures the plaintiff, it is actionable, but where he injures the plaintiff by maliciously preventing a person from entering into a contract with the plaintiff which he would otherwise have entered into, it is not actionable."

These observations have I believe been over-ruled; but, even with Lord Esher, they were not the sole *ratio decidendi*. For he goes on to say :—

"At any rate it appears to me, on the principle acted on in the case of *Gregory* v. *Duke of Brunswick* (2), when defendants conspire or combine maliciously to injure the plaintiff by preventing persons from entering into contracts with him, and injury results to the plaintiff, it is actionable."

Lopes, L.J., and Smith, L.J., decided the second branch of the case on this ground alone.

How does *Allen* v. *Flood* (3) conflict with this? In the shape which that case finally assumed the element of conspiracy had completely disappeared. Looking at it from the point of view most favourable to the plaintiffs, it amounted to no more than that the defendant Allen had induced the plaintiffs' employers to cease to give them employment by threatening to call out on strike their other workmen. It was held that inasmuch as the defendant had not caused the employers to break any contract with the plaintiffs, or to inflict on them any other legal injury, his acts, being lawful in themselves, did not become actionable by reason of their having been done from a bad or malicious motive. This decision is, as I have said, undoubtedly inconsistent with some of the obser-

(1) [1893] 1 Q. B. 715. (2) 6 M. & G. 953. (3) [1898] A. C. 1.

vations of Lord Esher in *Temperton* v. *Russell* (1), but it does not conflict with the judgments given therein by Smith, L.J., or, as far as I can see, by Lopes, L.J. On the contrary, Lord Herschell, Lord Shand, and Lord Macnaghten are most careful in excluding from the propositions they lay down cases of conspiracy—that is to say, the very case found by the jury in *Temperton* v. *Russell* (1), and in respect of which damages were assessed at £200. I have not the least disinclination to carry out to the fullest extent the principles of *Allen* v. *Flood* (2); and if there results from them the disastrous consequences which some of the Judges of the Divisional Court seem to fear, the defects of the law can be corrected in this instance, as they have been in many others, by the Legislature. But I should be straining those principles beyond the legitimate limit, if I were to make them the ground for overruling the decision of a Court of co-ordinate jurisdiction on a different cause of action, which the noble and learned Lords who expressed the opinion of the majority of the House excluded from consideration.

There is an essential distinction in the legal character of an act done by an individual and of the same act when it is the outcome of a criminal conspiracy. In the one case the fact that it causes damage does not necessarily give the individual, who suffers the damage, a cause of action: in the other, I am of opinion that the damage which flows from it is always actionable. There is much legal learning on this subject; but for my purpose it is enough to refer to *The Mogul Steamship Company* v. *M'Gregor, Gow, & Co.* (3). That action was exhaustively considered by the English Court of Appeal and the House of Lords, and enables me to pass by cases of earlier date and of less authority. The proposition I have stated was recognized by every Judge and Peer who took part in the decision; and the only subject of controversy was whether the evidence showed that a conspiracy existed.

I fully concur with Palles, C.B., in the view that the kind of conspiracy referred to, or contemplated, was a criminal conspiracy. My proposition is meaningless except upon this assumption. It is the offence against the public that stamps upon the act done

(1) [1893] 1 Q. B. 715. (2) [1898] A. C. 1. (3) [1892] A. C. 25.

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in furtherance of it an actionable character at the suit of an individual to whom it causes loss. This was, as I understand it, the foundation of the judgment in the second cause of action in *Temperton* v. *Russell* (1). It must also be the *ratio decidendi*, if the plaintiff is to succeed in the present case.

The crime of conspiracy consists in the mental agreement of two or more persons to do a certain thing by certain means. It involves illegality in either the end, the means, or both. The agreement to achieve a lawful object is criminal if the means proposed to effect it are unlawful. So, too, if the end is unlawful, the innocency of the methods contemplated does not make the agreement innocent. The actionable wrong, however, for which an individual can sue is not the mental agreement. It is the damage done him in carrying it out; and it arises equally whether the damage is caused by the means or end of the conspiracy. In the present case, the plaintiff says that the object at which the defendants aimed was to cripple him in his business, or to prevent him from carrying it on altogether; and that they proposed to effect this by causing or inducing his customers to cease to deal with him. I am not prepared to hold that as the case now stands the means proposed were in themselves illegal. The Lord Chief Justice was of opinion that unlawful intimidation and coercion were in contemplation. This question was not left to the jury; and I doubt if there was evidence that anything was intended beyond withdrawing from Munce and Leathem's other customers union labour. The threats instanced by the Lord Chief Justice were not referable to this branch of the case; and under any circumstances I am unable to regard them as of real importance. If there was illegality in the combination, it must, I think, be looked for in the object proposed. It is not unlike the alleged conspiracy in *Gregory* v. *The Duke of Brunswick* (2). It is not illegal, as far as I know, for one person or for several persons to hiss an actor on the stage. It is the ancient and recognized mode of conveying to the ill-graced artist that his representation fails to please. But an agreement to attend the theatre for the purpose of hissing an actor with the view of interfering with

(1) [1893] 1 Q. B. 715. (2) 6 M. & G. 953.

his means of livelihood is a criminal conspiracy. Those who take part in it can be indicted; and if the consequence to the individual attacked is the loss of future engagements, he has a right of action against the members of the combination. The law gives no greater protection to the comedian's art than to the more prosaic, but not less useful, business of a butcher.

The Mogul Steamship Company v. *M'Gregor & Co.* (1) illustrates the nature and limitations of this kind of conspiracy. All through that case it was recognized that every citizen has a right to carry on his business as seems best to himself, and that this right involves a correlative duty on the part of others not to interfere to his prejudice with the conduct of such business. It was also recognized that a combination entered into with intent to cripple a man in his trade, to drive away his customers, and to interfere with his profits, *might be* a criminal conspiracy. It would be so, as Bowen, L.J., puts if it were done without just cause or excuse. In that case it was held that it was justified. The defendants had employed the ordinary methods of competition for their own benefit; and although the result of their action was to cause loss to the plaintiff, his damage was strictly limited by the gain which the defendants desired to win for themselves. In other words, the justification negatived the bad motive or malicious intent. The case would have been otherwise decided, if there had been no just cause for the defendants' combination.

In the present case Fitz Gibbon, L.J., put the very point to the jury. He told them the questions to be considered included in particular the intent of the defendants to injure the plaintiff in his trade as distinguished from the intent of legitimately advancing their own interests. He instructed them that it would not be actionable if their intent and actions were directed to securing their own interests, or those of their trade, by reasonable means, including lawful combination, and gave them clearly to understand that they ought not to find for the plaintiff, unless, as distinguished from what was thus not actionable, there was an intent through combination to prevent the free action of the plaintiff's customers in dealing with him and consequent damage. This was

(1) 23 Q. B. D. 613.

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in substance the charge of the learned Judge; and I assume that the jury acted on it when they found that the defendants "maliciously conspired," or, in other words, had taken part in a criminal conspiracy.

There is only one other argument to be dealt with, that founded on section 3 of the Conspiracy and Protection of Property Act, 1875, which provides that an agreement or combination of two or more persons to do, or procure to be done, any act in contemplation, or furtherance, of a trade dispute between employers and workmen shall not be indictable as a conpiracy, if such act committed by one person would not be punishable as a crime. It is said that assuming that the conspiracy found by the jury would have been indictable before this statute, it is so no longer. My answer is that it is not an agreement in contemplation or furtherance of a trade dispute. The defendants' dispute with the plaintiff related to his employing non-union workmen; and if they had combined to withdraw from him society labour, and to prevent him by lawful means from supplying its place from other sources, the combination would have been within the description: but what connexion was there between this dispute and the mode in which Leathem bought and sold his goods? What had it to do with Munce's custom? No doubt the defendants' action in reference thereto arose from the anger, and hostility, engendered by the trade dispute; and the punishment inflicted on Leathem might help to bring him to terms. But the Legislature could not have contemplated this mode of furthering a trade dispute. The words relate to something done by men in relation to their own trade, and for the promotion of its interests. If the defendants had by way of punishment combined to prevent Leathem's tenants from paying their rents, or bakers from supplying him with bread, it might be said with as good reason that they were acting in furtherance of a trade dispute.

I need no authority for these propositions, but if one is required, it will be found in *Lyons & Sons* v. *Wilkins* (1). There the plaintiffs sought for an injunction to restrain the defendants with whom

(1) [1896] 1 Ch. 811.

they had a trade dispute from interfering not only with their own workmen, but also with the workmen of one Schoenthal, who was attacked solely because he did contract work for the plaintiffs. The case was decided on the ground that there was intimidation by picketing; but as regards Schoenthal's men, each of the three Judges in the Court of Appeal gave a second and independent ground for his judgment. Smith, L. J., said:—

"Was there any dispute between Schoenthal's workmen and himself? None at all. If there had been a trade dispute between Schoenthal's workmen and himself, I apprehend that the trades' union might have called his men out on strike: but that is not the state of things."

Kay, L.J., says:—

"No Act of Parliament justifies the calling out of Schoenthal's men. It would have been illegal before the Act. There is nothing in this Act that justifies it, and it is illegal still."

For these reasons, I am of opinion that the verdict and judgment for £200 ought to stand.

As regards the verdict and judgment for £50, I agree with the other members of the Court. The "Black List" was only an overt act of the conspiracy, and the sum awarded for it is included in the £200.

Solicitor for the plaintiff: *G. B. Wilkins.*
Solicitor for the defendants: *Joseph Donelly.*

R. D. M.

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THE GOVERNOR AND COMPANY OF THE BANK OF SCOTLAND *v.* CUNNINGHAM (1).

(1899. No. 7874.)

Debtors Act, 1872—*Payment by instalments*—*Customs pensioner*—*Pension inalienable.*

An order to pay a judgment debt by instalments will not be made against a Customs pensioner whose only property consists of a pension which is inalienable under the Customs and Inland Revenue Act, 1876, and no part of which has been received by him since the date of the judgment. Such a pension while accruing does not constitute "means" within the meaning of the Debtors Act. *Diss.* Boyd, J.

Summons on behalf of the plaintiffs that the defendant do pay in one sum, or in such instalments as the Court might think right, a judgment obtained by the plaintiffs against the defendant for £350 15*s.* 7*d.*

On the 15th of June, 1899, the plaintiffs obtained judgment against the defendant for £350 15*s.* 7*d.* On the 23rd of June, 1899, a writ of *fi. fa.* was issued, and a return of no goods was made by the sheriff. The defendant was entitled to a pension, as a retired customs officer, of £173 6*s.* 8*d.*, payable quarterly. No part of the pension had been received by the defendant since the date of the judgment.

Chambers, for the plaintiffs:—

The defendant relies on 39 & 40 Vict. c. 36, sect. 3, which says, that any disposition of this pension by the pensioner is void.

[O'Brien, J.: You must show means capable of being reached in law. Here he has no means capable of being reached in law.]

The scope and object of the Debtors Act is to punish a fraudulent debtor, that is, a debtor who had means to pay and did not pay. "Means of paying" is shown if it is shown that from time to time he has the money coming to him.

(1) Before O'Brien, Johnson, Boyd, and Kenny, JJ.

[JOHNSON, J.: Under the East India Acts it has been decided that so long as a pension exists as a pension it cannot be touched. But, if commuted for a capital sum, it is then freed from the terms of the Act, and can be reached.]

That is my point, once the money is paid over to him it is attachable. That is what the Government gave him the pension for, to enable him to pay his debts and live honourably. The order we ask affects the pension only when it is paid, not when it is still in the hands of the paymaster, nor even when due and payable. An order to pay by instalments does not override the Act of Parliament, because the Act says that he shall not assign or charge his pension. The plaintiffs do not ask for either an assignment or charge. The case of a married woman does not apply. A married woman is a protected person before the law. [He referred to *Morgan* v. *Eyre* (1); *Marris* v. *Ingram* (2); *Lavender's Policy* (3); *Scott* v. *Morley* (4); *Meager* v. *Pellew* (5).]

R. F. Todd, for the defendant:—

It is contrary to the policy of the Act to make an order of this kind. The money is given to him to allow him to live respectably, free from any antecedent debt or charge. In this case the debt is an old debt of ten or eleven years' standing. In this country means must be shown on the first application for instalments. Therefore the effect of the order asked for is to make an order to pay over a certain sum per month out of the fund.

It is admitted that a receiving order cannot be made. In effect the Court is asked to appoint the defendant a receiver over his own pension. [He referred to *Morgan* v. *Eyre* (1).]

O'BRIEN, J.:—

If the question were doubtful I would consider that, on certain well-known principles, the Court ought not to grant the order sought. It is not quite settled that the whole policy of the Debtors Act is not to prevent fraud, and you must conclude that

(1) 20 L. R. I. 541.
(2) 13 Ch. D. 338.
(3) [1898] 1 I. R. 175.
(4) 20 Q. B. D. 120.
(5) 14 Q. B. D. 973.

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the debtor has, in fraud of his creditor, refused to pay. But the main ground of objection to the order is unassailable, namely, that if made the Court would be indirectly repealing the Act and doing indirectly what it cannot do directly. If it were shown that any of the pension had been received it would be different. But the intention here is to appropriate the future gales of the pension, and I am satisfied that there is no evidence to satisfy the Court that the defendant is of present ability to pay. The question is a large one, as it arises under a number of other Acts, such as the Post Office Acts. I think it was intended by this Act to remove this pension from being touched by anyone or in any way.

JOHNSON, J.:—

The defendant has no property or income of any kind except a superannuation allowance granted to him under the Customs Consolidation Act, 39 & 40 Vict. c. 36, payable quarterly. Section 3 of this Act enacts that it shall not be lawful for the defendant to assign or dispose of his allowance to any person, and that any such assignment or disposition shall be void to all intents and purposes, and shall not be enforced in any Court of law or equity. Voluntary alienation of this allowance is therefore absolutely unlawful and prohibited by the Act. One quarter of the defendant's superannuation is now accruing: the quarterly day of payment has not yet arrived. In this state of things it is contended for the plaintiff—a judgment creditor of the defendant—that the defendant has the means to pay the judgment debt by instalments, because when and as his superannuation allowance shall hereafter be paid to him quarterly he will hold that money when received by him free and discharged from the restrictive provisions of the Act, and available to pay such instalments, and therefore that an order ought now to be made prospectively against him under the Debtors Act to pay this judgment-debt by instalments, with the result that if he should fail to pay the instalments he would be liable to committal for non-payment. I think that such an undertaking by the debtor himself would by the Act be unlawful, and that the Court ought not to endeavour by its order indirectly to compel the debtor to do that which by the Act it is not lawful for him to do directly.

BOYD, J.:—

I regret that I cannot concur with the other members of the Court. The only question at present for our consideration is, has the defendant means out of which the Court should order him to pay the debt by instalments or otherwise. He is, admittedly, entitled to a pension of £175 receivable by him in quarterly payments. This pension has been granted subject to the statutable provision that same cannot be assigned, disposed of, or charged by the recipient; but I think it is going too far to say that an unmarried man who receives £175 a-year, and is living with his father, and has no expenses to provide for except his mere personal expenses, has no means. It is not sought by the order asked for to anticipate or assign the pension. The plaintiff merely seeks an order that out of his income when received he shall pay the debt for which judgment has been recovered by such instalments as the Court shall consider reasonable. It was never contemplated by the Legislature that the defendant was to be deprived of all credit, or that when he received the money he should not be liable to pay for goods obtained on credit for his maintenance and support. I am not prepared to hold that a man who is entitled to receive a pension, no matter how large it may be, has no means applicable to the payment of his debts. I, therefore, am of opinion that the statute does not prevent an order being made in the present case. The amount of the instalments by which the debt should be discharged is in the discretion of the Court, and must depend upon the circumstances of each case.

KENNY, J.:—

By section 6, sub-section 2, of the Debtors Act (Ireland) 1872, the jurisdiction to commit is exerciseable only "where it is proved to the satisfaction of the Court that the person making default either has or has had since the date of the order or judgment the means to pay the sum in respect of which he has made default, and has refused or neglected, or refuses or neglects to pay the same." The same sub-section also provides that—"For the purposes of this section any Court may direct any debt due from any person in pursuance of any order or judgment of that or any other competent Court to be paid by instalments, and may from

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time to time rescind or vary such order." The practice in this country is settled that in cases of ordinary judgment where no fixed period is mentioned for payment of the debt, an order for payment of the latter either in one sum or by instalments at stated times must be obtained before applying for a committal order, and that proof of "means" must be given to entitle the creditor to the preliminary order; and, again, on the application for the committal order. The application now before us is for the preliminary order, and, to grant it we must be satisfied that the debtor either has now, or has had since the date of the judgment, the "means" to pay the debt. It is not alleged that he has or has had "means" other than his pension, which is, admittedly, inalienable. Neither is it suggested that he has received any gale of that pension since the date of the judgment, and therefore the question for us to determine is whether the future gales of a pension which is inalienable may be regarded as "means" for the purpose of the statute.

Morgan v. *Eyre* (1), has been relied on, in opposition to the motion. There, it was held that, in the case of a married woman debtor—whose only property was subject to a restraint on anticipation, there were no "means" to justify an order for payment by instalments. And that,—although between the dates of the judgment and the application she had received a gale of her separate income which undoubtedly would have been discharged from the restraint on anticipation from the moment it accrued due to her: *Hood Barrs* v. *Heriot* (2). The decision in *Morgan* v. *Eyre* (1) followed the reasoning of the Queen's Bench Division in England in *Draycott* v. *Harrison* (3), and both cases are authorities on the point which was left undecided by the Court of Appeal in *Meager* v. *Pellew* (4), namely, as to whether a judgment against a married woman, limited to her separate property not restrained from anticipation, could be made the basis for an order of committal when she had actually received some of her income after the date of the judgment. It is unnecessary to consider how far these cases are affected by *Hood Barrs* v. *Heriot* (2), but their authority is unshaken in a case where no income has come to the

(1) 20 L. R. I. 541.
(2) [1896] A. C. 174.
(3) 17 Q. B. D. 147.
(4) 14 Q. B D. 973.

hands of the married woman since the date of the judgment. In the case before us we have to deal, not with a judgment specially framed and directed against property of a particular character, but with an ordinary personal judgment against a debtor whose only "means" is a pension, inalienable by Act of Parliament and none of which he is alleged to have received since the date of the judgment. In my opinion, the right to receive this pension cannot be regarded as "means" which the debtor now has. Were we to hold the contrary, we would be indirectly contravening the spirit, and indeed the letter, of the statute which protects the pension—for our order would act as a sword hanging over the debtor's head, forcing him to apply the future gales in even a more effective manner than if we did what it is not contended we could do—namely, give a charging order against the pension. I therefore concur in the order refusing this application.

Solicitors for the plaintiffs: *George M'Ildowie & Sons.*
Solicitor for the defendant: *J. A. Synott.*

J. M^c^G.

SULLIVAN, TENANT; MARSHALL, LANDLORD (1).

Landlord and Tenant—Land Law Acts, 1881-96—*Character of holding—Home farm—Land Law (Ireland) Act*, 1896, *sect.* 5, *sub-sect.* (1) (*b*) (i).

J. M., a landed proprietor in the county of Tipperary, farmed his own lands comprising 600 or 700 acres. The lands consisted of the demesne round the mansion-house of 50 acres, and six other farms which varied in size from 80 to 150 acres; and portion of the produce of these farms in question was used in connection with the mansion-house.

He died in 1865, leaving a widow and four minor children; and after his death his widow broke up the establishment, and went to reside abroad, and the farms, with one exception, were let to tenants. One of these, containing 87 acres (Ir.), was let by Mrs. M. to S. by agreement dated the 4th December, 1866, by which S. agreed to become tenant from year to year at the rent

(1) Before MEREDITH, J., and the Hon. GERALD FITZGERALD, Q.C.

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of £122, and to keep the buildings in repair, and to reside on the farm. In 1879 T. K. M., the eldest son of J. M., came of age, and served notice to quit upon S.; but he afterwards withdrew this notice. In 1881 S. served notice to fix a fair rent, to which the landlord replied by serving a notice to fix a fair rent, demanding an increase of rent, and notice that, it being an English managed estate, the permanent improvements were the landlord's, and a notice to fix a specified value. The originating notice was dismissed on the ground that the holding was a pasture letting valued at over £100 a-year. After the passing of the Land Act of 1896 the tenant served a fresh originating notice; and the sub-Commission having fixed a fair rent, the Land Commission reversed this decision, and dismissed the originating notice on the ground that the holding was a home farm:—

Held (reversing the decision of the Land Commission) that the holding was not a home farm.

The Rev. Joseph Marshall, a landed proprietor, who resided on his property in North Tipperary, carried on farming very extensively. The mansion-house of Barroncourt, where he resided, was surrounded by a demesne of 50 acres, and in close proximity to it there were several other farms, all of which he kept in his own hands and worked for profit. There were, the farm in question, Sullivan's, comprising 82 acres; Carronhill, 30 acres; Cruise's farm, over 100 acres; Burke's farm, 80 acres; L'Estrange's, 150 acres; O'Brien's, 80 acres, and Johnston's farm, the acreage of which was not proved. The acreage of all these was Irish plantation measure. The produce of some of these was used by the landlord in connection with his house and establishment, which was a very large one.

Mr. Marshall died in December, 1865, leaving a widow and four minor children. The eldest son was sent to school, and Mrs. Marshall broke up the establishment, and went to reside on the Continent with the other children. The farms, which up to that time had all been in the hands of the landlord, were let out, except Carronhill. The farm in question was let by an agreement, dated the 4th December, 1866, made between Mrs. Marshall and Thomas Sullivan, and Patrick Sullivan. By this agreement Mrs. Marshall agreed to let, and Thomas Sullivan agreed to take and hold as tenant from year to year, 87 acres or thereabouts, Irish plantation measure, of the lands of Barroncourt, as then in Mrs. Marshall's possession, together with the dwelling-house thereto-

fore occupied by the said Mrs. Marshall's steward, and the farm and offices, consisting of a long cattle shed and two other houses, and also the labourer's cottage theretofore occupied by Patrick Kennedy, at the yearly rent of £122 sterling, the tenancy to commence from the 1st November last. In consideration of the letting the tenants, Sullivan, agreed that either party was to be at liberty to determine the tenancy by giving the usual six months' notice in writing to the other party. Thomas Sullivan agreed not to sow two corn crops in succession, or sell or remove any hay or straw off any portion of the lands without the consent in writing of Mrs. Marshall or her land agent. The house and offices having been lately put into thorough repair, were to be kept in a like condition by the said Thomas Sullivan, who agreed to reside permanently therein within one year from the date of the agreement. The farm offices and labourer's cottage were to be kept in good order, as also the iron gates and fences. The said Thomas Sullivan was not to break up or till any portion of the lands which were then in grass.

Prior to the date of the letting Thomas Sullivan lived in the King's County, where he had a farm. The demesne of Barroncourt was separated from the farm in question by a lane.

In 1879 Thomas Kennedy Marshall, the eldest son of the Rev. Joseph Marshall, came of age, and took up the management of the property. He then served a notice to quit on Sullivan, but he afterwards withdrew it. In 1881 the tenant served a notice to fix a fair rent, and the landlord served three notices on the tenant in reply—(1) a notice demanding an increase of rent up to £200 a-year; (2) a notice that this being an English managed estate, the permanent improvements were the landlord's; and (3) a notice to fix the specified value.

The tenant's originating notice was dismissed on the ground that the letting was for the purpose of pasture, and the value of the farm was over £100 a-year. After the passing of the Act of 1896, the tenant served a new originating notice, as by sect. 5, sub-sect. (1) (*b*) (i) of the Act of 1896, the holding was no longer excluded as a pasture holding.

The Sub-Commission fixed a fair rent, and the landlord appealed.

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Wakely, for the landlord.

SULLIVAN, *Tenant;* MARSHALL, *Landlord.*

T. M. Healy, for the tenant.

MEREDITH, J. :—

The notice of appeal on behalf of the landlord in this case raises the question that the holding is not one to which the Land Law (Ireland) Acts apply, being a home farm. The farm was let on the 4th Dec., 1866, by Mrs. Sophia Marshall, to Thomas Sullivan, and Patrick Sullivan. The memorandum of agreement embodying the terms of the letting is of great importance in the case. Mrs. Sophia Marshall agrees to let, and the said Thomas Sullivan agrees to take, and to hold as tenant from year to year, 87 acres or thereabouts Irish plantation measure of the lands of Barroncourt as now in Mrs. Marshall's possession, together with the dwelling-house heretofore occupied by the said Mrs. Marshall's steward and the farm offices, consisting of a long cattle shed and two other houses, and also the labourer's cottage hitherto occupied by Patrick Kennedy, at the yearly rent of £122 sterling, the tenancy to commence from 1st November last. In consideration of the letting the tenants, Sullivan, agree that either party is to be at liberty to determine the tenancy by giving the usual six months' notice in writing to the other party. He, Thomas Sullivan, agrees not to sow two corn crops in succession, or sell or remove any hay or straw off any portion of the lands without the consent in writing of Mrs. Sophia Marshall, or her land agent, first had or obtained, under a penalty. The house and offices having been lately put into thorough repair, are to be kept in a like condition by the said Thomas Sullivan, who agrees to reside permanently therein within one year from the date of these presents. The farm offices, and labourer's cottage, to be kept by him in good order, as also the iron gates and fences. The said Thomas Sullivan is not to break up or till any portion of the said lands which are now in grass, but he may till the two fields, which are in tillage. Then a provision that the said Thomas Sullivan is not to make any improvements in draining, building, liming, levelling, or making roads or fences on the said lands, without the consent in writing of the said Mrs. Sophia Marshall, or her land agent,

and in case she shall be obliged to proceed for non-payment of rent it shall not be necessary to serve notice to quit, or an ejectment grounded thereon, on any person except the said Thomas Sullivan.

The lessor Mrs. Sophia Marshall was the widow of the Rev. Joseph Marshall. The Rev. Joseph Marshall died in Christmas 1865, and he was apparently a large landowner, residing in a mansion, which is sometimes called by the name of Barroncourt, and sometimes called by the name of Killakelly. The mansion house, the lawn and the demesne of Barroncourt, are separated from the holding in question by a laneway. There are two entrances on either side of the lane leading from the demesne and lawn into the present holding. As appears by the agreement which I have read, the steward's house was upon the demised holding, and we are satisfied from the evidence of Mr. Toler Garvey, who acted as the agent in the lifetime of Mr. Marshall, and continued agent for some two years after the death of Mr. Marshall, and who made the letting of the holding in question to Sullivan, that prior to the death of Mr. Marshall this holding was in the occupation of Mr. Marshall, his steward lived in the house, the holding was partly in tillage, partly in pasture, and Mr. Marshall used the holding in connection with his residence and in connection with his demesne land. Mr. Garvey says that cattle were interchanged, tillage was taken to the farm at the back of the mansion house, produce was more or less used in connection with the mansion house, so long as he had any connection with the place. Well, having regard to these facts, it would seem reasonably plain and clear that during the lifetime of Mr. Marshall this was his home farm, used in connection with his residence and in connection with his demesne. Mr. Marshall died, leaving a widow and some children, the eldest of whom is the present landlord, and the agent Mr. Toler Garvey made arrangements for letting this holding as well as three or four other farms which had also been in the possession of and worked by Mr. Marshall, but which were not so immediately connected with the demesne and residence of Mr. Marshall, and were used mostly, if not altogether, in grass. Mrs. Marshall went to reside upon the Continent; that fact was proved by Mr. Toler Garvey. Now these being the facts of the

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SULLIVAN, *Tenant;* MARSHALL, *Landlord.*

Meredith, J.

case, the question is, whether the holding before the Court is a home farm within the meaning of the term "home farm" as used in the Acts of 1881 and 1896? Section 5 (1) of the Act of 1896 is as follows:—"The Land Law Acts shall not apply to the following tenancies:—(*b*) To a tenancy in any holding, which substantially consists of—(i) land, being or forming part of a home farm." There have not been many instances of farms excluded from the Land Acts as home farms, but I think that if any case does come within the meaning and intendment of the section to which I have referred and of the decisions upon the subject of home farms, this case comes within the section and the authorities. The order made by the Court of Appeal, in *Hamilton* v. *Sharpe* (1), which was a case in which the landlord was desirous of resuming possession of a holding for the purpose of a home farm, recited that the Court of Appeal understood from the case stated that "it appeared to the Land Commission that the landlord desired to resume the holding in question, for the *bona fide* purpose of keeping the same as a farm to be used for the convenience or advantage of his residence, and in connection therewith, and not merely as an ordinary farm to be used for the purpose of profit." That recital manifestly embodies a definition of "home farm" which commended itself to the Court of Appeal. Then there is the definition of Mr. Rearden, the Sub-Commissioner, which was quoted with approval by Lord Ashbourne, in *Hamilton* v. *Sharpe* (1), and the definition in *Gamble* v. *Simpson* (2) which was adopted by Chief Justice Morris. The facts of this case appear to us to bring the present holding within each and all of these definitions. It seems to be a case in which, owing to the circumstances of the family, and indeed to meet a temporary exigency and temporary necessity, the home farm of the Marshall family was parted with to a tenant from year to year, who was bound by the provisions of the agreement to which I have referred, to keep up and maintain the steward's house upon the farm, and the other farm offices. For these reasons we are of opinion that the decision of the Sub-Commission should be reversed and that

(1) 20 L. R. Ir. 224.

(2) 17 I. L. T. R. 44.

the originating notice should be dismissed on the ground that the holding substantially consists of land being or forming part of a home farm.

W. C. S.

Land Com. 1899.

SULLIVAN, *Tenant;* MARSHALL, *Landlord.*

Meredith, J.

The tenant appealed to the Court of Appeal (1).

Appeal. May 10.

Henry Richards (with him *T. M. Healy, Q. C.*), for the appellant:—

This holding never was a home farm within the meaning of the Land Acts: it was a portion of the very large farming establishment which the Rev. Mr. Marshall worked. If there was a home farm in connection with the mansion at all it was Carronhill. The present landlord has no intention of taking up the farm to work it himself; his sole desire is to keep the tenant out of the Land Acts. Moreover, when the case was before the Sub-Commission in 1883 the landlord never made the case that this was a home farm, but he defeated the tenant on the ground that it was a pasture holding. That ground of defence is no longer open, in consequence of sect. 5, sub-sect. (1) (*b*) (i) of the Act of 1896, and for the first time the case of a home farm is set up.

Secondly, if it ever was a home farm, it has ceased to retain that character. After the death of Mr. Marshall his widow let out all the farms except Carronhill, and the terms of the lease of Sullivan's farm show that it was an ordinary agricultural farm letting. The tenant came from another county, and there is the clause providing that he was to reside on the holding, which is inconsistent with the idea of a home farm.

Lastly, we say the landlord is estopped from saying that this holding is excepted from the Land Acts, because by serving the notice in 1881 demanding an increase of rent he admitted that the case was within the Land Acts: *Massy* v. *Norse* (2).

(1) Before FITZ GIBBON, WALKER, and HOLMES, L.JJ.
(2) 20 L. R. Ir. 57, 464.

Appeal. 1899.

SULLIVAN, *Tenant;* MARSHALL, *Landlord.*

Wakely, Q. C., and *W. G. Jefferson*, for the respondent:—

The question is: Was this a home farm at the time it was let by Mrs. Marshall, and is it one of the holdings excepted from the Land Acts? The evidence shows plainly that it was a home farm in the hands of the former landlord, and down to the time that it was let to Sullivan, the produce being used in connection with the establishment. It cannot be deprived of that character, because the tenant has been in occupation for a number of years. The letting by Mrs. Marshall simply arose from the circumstances of the landlord's family. She was unable to work so much land in farming. That will not alter the character of the holding.

[Counsel referred to *Hamilton* v. *Sharpe* (1)].

FITZ GIBBON, L. J.:—

The Land Commission dismissed the tenant's originating notice, "it appearing that the holding consisted substantially of a home farm." The first question is: What is the meaning of the term "home farm," in the exception from the Land Acts? When the question arises the land must be held by an agricultural or pastoral tenant. Therefore the exception must mean that the land was, before the letting, a "home farm," and has not lost that character. What is the excluding character? If a farmer lives in a house on his farm, he may use his farm in connection with his house; but that cannot make it "a home farm," because that would exclude every resident farmer. It must, therefore, mean that the farm is used as an adjunct to the home, by utilizing the produce for the use of the residence, as distinguished from raising it and using it for pecuniary profit. That being so, what is the effect of the exclusion, and how does it operate? The land being agricultural or pastoral, it cannot be used as a "home farm" during the letting, because if so used by the landlord, there would be no tenant to be excepted from the Acts. Therefore the exception is similar to that of "demesne land," in that the excluding character existed at the time of the letting, and is only suspended or qualified during the tenancy, and not

(1) 20 L. R. Ir. 224.

finally lost. It must still attach to the holding either historically, *i. e.* from the past, or it must be capable of attaching in the future, *i. e.* at the end of the letting, or both. If it were a home farm up to the letting, Mr. Wakely contended that it must be excluded, in spite of either landlord or tenant, and even though the landlord deliberately gave it up as a home farm, and let it, and the tenant took it, as an ordinary agricultural or pastoral farm. In analogy to the decisions on demesne land, I hold that the exception applies to a *potential* home farm, which is in the possession of an agricultural or pastoral tenant. But it must have that character in connection with the home of the landlord. The power of resumption of leased land, under the Act of 1881, sect. 21, extends to land which, though never previously a home farm, is required by the landlord for the purpose of using it as such. Having said so much on the general law, I turn to the facts of this particular case. There are two questions:—First, Was this land ever a home farm? If ever it was a home farm it was that of Joseph Marshall, who died in 1865. He was a country gentleman, who lived at Barroncourt, which I assume to be a mansion house with about fifty acres of demesne land attached. Of those fifty acres more than half was wood-land, and the rest was ornamental ground, such as usually surrounds a large dwelling-house. There was no farming land within the actual demesne. He had also, on the opposite side of the main road bounding the demesne, the farm of Carronhill, part of which was in tillage, and in addition he had six other farms, of which what afterwards became Cruise's contained over 100 acres Irish; Burke's 80 acres; L'Estrange's 150; the farm now in question 82; O'Brien's 80; and of a sixth, afterwards Johnson's, the acreage is not stated. Therefore Joseph Marshall actually farmed, outside his demesne, at least 500 Irish acres, probably 600, and possibly 700—an immense establishment and a great business, carried on by a country gentleman. He was no mere idle grazier. He carried on the business of a large farmer, holding the position of a country gentleman. He died in December, 1865. I assume that, up to his death, each of these farms contributed some produce to the use of the establishment, but they certainly were not all "home farms." As to the farm in question, the evidence of young Marshall was:—

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Fitz Gibbon, L.J.

"My father farmed it in a general way." This is not enough to make it a home farm. There was some difference in the situation of the farms, and in the way they were used. The steward lived on the one which was afterwards let to Sullivan, and the coachman lived on Carronhill. I cannot come to the conclusion that whatever domestic use was made of the produce of these 82 acres, in the lifetime of Joseph Marshall, made that place as used by him a "home farm" within the meaning of the Act, any more than any other of the six neighbouring farms, which were afterwards let to tenants. Immediately after the death of Joseph Marshall, his widow proceeded to let all these farms to tenants, except Carronhill. If any of them was at that time a home farm it was Carronhill, and it was kept, either because it was a home farm already, or because it was the most convenient and suitable for use with the residence.

The object of the transactions of 1866 was to reduce the amount of land which was in hand, and which had been farmed by Joseph Marshall, and to let away six of the seven farms separately to tenants.

The terms of the letting show no intention to retain this holding as a home farm. These exclusions from the benefit of the Land Acts, from their nature and character, indicate something special and temporary. What word would most aptly negative any such idea? the word "permanent" as applied to the letting; and it is used in this agreement: the younger tenant was brought in from another parish, and he expressly bound himself within a year to come to reside "*permanently*" on the farm. The document itself, therefore, declared an intention to create a permanent letting.

The present landlord came of age in 1879, and took up the management of his property. In 1881 the tenant served notice to fix a fair rent. The landlord cannot be estopped because he availed himself of every form to defend himself. But he served three notices; the first, a notice to fix a fair rent after demanding an increase; the second, a notice that it was "an English managed estate," and that the permanent improvements were the landlord's; and the third, a notice to fix a specified value. The service of these notices is strong evidence that this was not

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a home farm, not having been accompanied by any assertion that it was one. But the landlord did assert that the letting was for the purpose of pasture; and it certainly is a strong fact in the case, that the ground upon which the landlord resisted the tenant's claim to fix a fair rent was not that the holding was a home farm, but that it was let for pasture. The subsequent conduct of the parties strengthens this view: from 1879 until this day, and even after the dismissal of the originating notice, the landlord has never indicated any desire to take up the land. It may be that he did not want to press the tenant, or it may be that influence was brought to bear on him by others, but he did not serve any notice to quit; and even now he says only that he wants to keep the holding out of the Land Acts. In 1896 the Act of Parliament brought within the Land Acts a tenant holding under a grazing letting, where, as here, the valuation does not exceed £100. Under these circumstances it appears to be impossible to hold that this land ever was, or now is, a home farm. Even if it had that character in Joseph Marshall's hands, which I think it had not, that character was put an end to by the letting of it as a farm in 1866, and by its having been left for thirty-three years in the possession of an ordinary agricultural or pastoral tenant.

The order of the Land Commission, therefore, cannot, in my opinion, be sustained.

WALKER, L.J.:—

I concur with Fitz Gibbon, L.J., and have but a very few words to add. I am satisfied that this was not a home farm when let in 1866, and that would be sufficient to dispose of Mr. Wakely's argument, that if when let originally it was a home farm, the tenant would be now excluded from the benefit of the Land Acts.

Section 5 of the Act of 1896 applies to the case of a tenancy in a holding which substantially consists of land being or forming part of a home farm. Even though it originally fulfilled that character, something might occur to deprive the farm of it.

I quite agree that if it was a home farm when let originally, the mere fact that the tenant had had it in his possession for

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a number of years would not be enough of itself to deprive it of that character. In that I agree with Mr. Wakely; but, in my opinion, this was not a home farm when demised. There was a large establishment and demesne kept up by the former owner; and he had seven other farms in his hands. The farm in question was less distant from the mansion than some of the others, and so some of the produce was used in the house. Then what happened? The owner died, and, as the widow was not able to work so large an establishment, the farms were let. I wish that the leases of some of these other farms had been produced in evidence. Cruise's was called in the evidence the "estate" farm. I think it was little different in character from the present. Then when we come to the letting of the present farm in 1866, the agreement contained clauses which are inconsistent with anything but an agricultural holding: for instance, that the tenant should live permanently on the farm, and that he might till 10 acres out of 80.

Then there is a lapse of thirteen years till 1879, when Mr. Marshall came of age, and he served a notice to quit on the tenant; but partly from feelings of benevolence, and partly owing to the influence of other motives, he withdrew it. Then the Land Law Act of 1881 was passed, and notice to fix a fair rent was served by the tenant. The landlord replied by serving several notices; but, in my opinion, they do not create an estoppel, as I think it probable that these notices were served by his solicitor, and indeed they were more or less common form. On the 1st November, 1883, the tenant's originating notice was dismissed, the Sub-Commission deciding that the holding was excluded from the Land Law Act as being a pasture holding valued at not less than £50. That gave the landlord the right to serve notice to quit. He did not do so. Why? Because, as he said himself, he was quite content if the tenant were kept out of the Land Acts.

Then another period of thirteen years elapsed; the Land Act of 1896 was passed, and the tenant served another notice to fix a fair rent, and the landlord was driven to fight this on a different basis, because the Act of 1896 had enlarged the limit of exclusion of pasture holdings to those of the value of £100. All this

satisfies me that this was never considered, or contended to be, a home farm until the present litigation arose. On the evidence I think it was not a home farm when let. I am, therefore, of opinion that the decision of the Land Commission should be reversed.

HOLMES, L.J. :—

The cardinal question upon which, in my opinion, the decision of this case depends is whether the holding was a home farm in the hands of the late Mr. Marshall up to and at the time of his death. I say so because if it were then a home farm, I am not satisfied that what has since occurred has altered its character, although it may throw important light on what its previous character really was.

Both the name "home farm" and the thing itself are exceptional in Ireland; but it is not difficult to give the expression a construction. It must mean something more than lands in the occupation of the owner of an estate. It often happens that a resident landowner farms a portion of his estate himself, but what he so farms is not properly called a home farm unless his primary objects are the use and convenience of his residence as distinguished from mere commercial profit. I do not mean to convey that the idea of pecuniary profit must be absent—on the contrary, the enjoyment and consumption by himself, his family, and his servants of what is produced and raised for home use may save him much money; and probably a small surplus may go to market; but its essential characteristic is that it is an accessory to the residence.

Now, the late Mr. Marshall was an agriculturist on a most extensive scale. He had between 500 and 600 acres in the immediate neighbourhood of his house in his own hands; and he made, or he tried to make, an income out of them as a substitute for the rents that he would have received if he had let them to tenants. The holding in this case was neither more nor less than part of this extensive farming enterprise; and there is no greater reason for giving it the name of home farm than any other of the holdings into which the land in Mr. Marshall's hands was broken up after his death.

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I attach no importance to what was done by his widow, because she was only entitled during the minority of her son, and also because she seems to have made the lettings in consequence of her going to reside abroad for some years. But the present landlord came of age in 1879, and could have taken up this holding at any time between that year and 1896. He did not do so, for, unlike his father, he was not and did not wish to become a farmer. But he resided in the family mansion-house; and as a home farm, these lands would have been as necessary or convenient since 1879 as before 1865. I am satisfied that they were never regarded as such at any time; and that the notices to quit and other litigation referred to were not dictated by a desire to acquire them for this purpose, but to prevent them coming within the operation of the Land Acts—an object which before the statute of 1896 was successfully achieved by showing that they were let mainly for the purpose of pasture.

Solicitor for the tenant: *J. F. Power.*
Solicitors for the landlord: *Mitchell & Sons.*

R. D. M.

Q. B. Div. Bankruptcy. 1899. June 9.

IN RE KEANE, A BANKRUPT (1).

Bankruptcy—Charge and discharge—Debt secured by equitable mortgage—Mortgagor sued by mortgagee—Judgment—Execution—Sale of mortgaged premises by sheriff—Subsequent bankruptcy of mortgagor—Service of notice on sheriff—Lodgment of purchase money in Court—Application for payment out by mortgagee—Right of the assignees.

A bankrupt, before his adjudication, was in possession of certain houses and premises subject to an equitable mortgage. The equitable mortgagee sued for the debt, thereby secured, and having recovered judgment issued execution; and the premises were sold by the sheriff for a sum less than the amount of the debt. The existence of the equitable mortgage was not referred to either in the sheriff's auction bill or the conditions of sale. On the following day the purchaser lodged the proceeds of the sale with the

(1) Before BOYD, J.

sheriff. The adjudication took place four days afterwards, and the sheriff, being served with notice by the assignees, lodged the money in Court.

The equitable mortgagee, having filed a charge to have it declared that he was entitled, as equitable mortgagee, to have the money paid out to him:—

Held, that the equitable mortgagee was not entitled to have the money paid out to him, which he had recovered not as mortgagee, but in the capacity of an unsecured creditor; and that consequently the money should be dealt with under the Bankruptcy (Ireland) Amendment Act, 1872, sect. 54.

On the 12th July, 1897, the bankrupt deposited with Peter Higgins (the chargeant) the title deeds of a licensed house and premises situated in Castle-street, Sligo, to secure chargeant in respect of a sum of £406 0*s.* 5*d.*, then due by the bankrupt, and also to secure any further balance due to chargeant, and a guarantee given by chargeant to the Provincial Bank to secure any overdraft of the bankrupt, not exceeding £200.

On the 31st October, 1898, chargeant issued a writ against the bankrupt for £431 18*s.* 9*d.*, due by the bankrupt, and recovered judgment for the full sum with costs. On the 18th November, 1898, the sheriff of Sligo caused the interest (if any) of the bankrupt in the premises to be put up for sale, and Mr. Michael Keane was declared the purchaser. On the 19th November, 1898, the purchaser lodged the sum of £300, being the amount of the purchase-money, with the sheriff. John Keane was adjudicated a bankrupt on the 23rd November, 1898, and the sheriff having been served with notice under sect. 54 of the Bankruptcy (Ireland) Act, 1872, lodged the sum of £293 9*s.* 6*d.* with the official assignees.

The property sold by the sheriff was described in the auction bill as follows:—"The stock in trade and household furniture under seizure; also the defendant's interest (if any) in the licensed house and premises situated at the junction of Castle-street and Abbey-street, also the two small dwelling-houses attached, situated at that street, at present in the occupation of Thomas O'Rorke and Matthew M'Nulty, each paying 4*s.* per week; whole held under lease from Sarah Phibbs and others for thirty-one years, from the 1st May, 1884, at the yearly rent of £50. Poor Law valuation £27 10*s.*"

The conditions of sale, so far as they are material, are referred to in the judgment of Boyd, J.

Q. B. Div. 1899.

In re KEANE.

The present charge was filed by the chargeant, in which he submitted that he was entitled to be paid the sum in the hands of the official assignees by way of charge or lien on the interest of the bankrupt in the above-mentioned premises.

Ignatius O'Brien, Q.C., and *Powell*, for the chargeant, cited *Kearney* v. *Ryan* (1).

D. Henry, Q.C., and *R. Doyle*, for the assignees, cited *In re Elliott's Estate* (2); *In re Jenning's Estate* (3); *Chapman* v. *Speller* (4).

BOYD, J. :—

This case comes before me simply as a case of a person, who in a two-fold capacity has claims against these lands; in the one as equitable mortgagee, and in the other as judgment creditor. He brought an action on the debt, secured by the equitable mortgage, and recovered judgment, and placed the judgment in the hands of the sheriff, who thereupon seized the property of the debtor (the present bankrupt), including the interest of the debtor in the lands comprised in the equitable mortgage. He then issued the following advertisement: "I will on Friday, the 18th day of November, 1898, set up and sell by auction the stock in trade and household furniture under seizure, also the defendant's interest, *if any*, in the licensed house and premises, &c." The auction bill then goes on to describe the licensed house and premises. The sheriff afterwards published the conditions of sale, of which No. 1 is as follows:—"the highest bidder shall be the purchaser, and if any dispute shall arise between two or more purchasers bidding the same amount, the defendant's interest (*if any*) in the whole premises shall again be put up at the last undisputed bidding." There is also a specific clause (condition No. 4), that "the sheriff will not be accountable to the purchaser for possession of the premises or for title thereto." There is also an acknowledgment signed by Michael Keane, the purchaser, that he had purchased by public auction at sheriff's sale, the interest (*if any*) of the licensed house

(1) 2 L. R. I. 61.
(2) Ir. R. 8 Eq. 565.
(3) 15 L. R. I. 277.
(4) 14 Q. B. 621.

and premises for the sum of £300, and that he had paid same into the hands of the sheriff and that he would in all other respects fulfil the conditions of sale.

Under these circumstances, the present application is made on behalf of the equitable mortgagee, that what he has realised not as equitable mortgagee, but as judgment creditor, should be paid over to him.

The present case is not within *Kearney* v. *Ryan* (1). In *Kearney* v. *Ryan* (1), there were no such conditions of sale as there are in the present case, and it was upon the absence of such conditions that the Judges based their judgments. There was a controversy in the Court below, as to the conditions which the lands were sold subject to, and the question was left to the jury, who found that a subsisting term in the lands had in fact been sold. On these grounds the present case is wholly distinguishable from *Kearney* v. *Ryan* (1).

I am unable to see why the equitable mortgagee has the right to capture this money, which was realised not on his security as equitable mortgagee, but under his judgment. I am therefore of opinion, that the contention of the assignees is right.

Solicitor for the chargeant: *Sheridan.*
Solicitor for the assignees: *Leachman.*

J. MAC M.

(1) 2 L. R. I. 61.

Q. B. Div.
1899.
April 17, 28.
Appeal.
June 2.

M'CARTHY *v.* MAGUIRE (1).

(1898. No. 17,111.)

Libel—Excessive damages—New trial.

The defendant, in a letter addressed to the Local Government Board, asking for an inquiry into the conduct of the plaintiff as solicitor for the boroug of S., accused the plaintiff of forging a certificate of taxation, and of obtaining the amount of a bill of costs by false pretences; and, when sued in libel, pleaded privilege. The jury found a verdict for the plaintiff for £150. The evidence showed that the accusation was made maliciously and without any foundation whatever. On new trial motion—

Held, by the Queen's Bench Division, and, on appeal, by the Court of Appeal, that, the damages awarded "not being so large as that twelve sensible men could not reasonably have given them," the verdict could not be disturbed.

New Trial Motion of an action for libel tried before Mr. Justice Andrews and a special jury. The circumstances of the case appear fully in the judgment of the Lord Chief Justice. At the trial, the learned Judge (as stated in his report) "explained to the jury what a libel was, and the law of privilege as applicable to the case, and left them the whole case on the facts." The jury brought in a verdict for £150, and judgment was entered for that amount with costs.

Matheson, Q.C., for the defendant, now moved to have the verdict and judgment set aside, and that judgment be entered for the defendant, or for a new trial, on the ground (substantially) that the Judge should have directed the jury that the letter written by the defendant to the Local Government Board on the 3rd November, 1898, was a privileged communication, and that the damages were excessive. The main contention of counsel for the defendant, who relied on the fact that there was no evidence

(1) Before Sir Peter O'Brien, L.C.J., and O'Brien, Boyd, and Kenny, JJ.

that the plaintiff had suffered any actual injury, was that the damages were excessive, citing *Harris v. Arnott* (1).

G. Wright, Q.C., and *Taylor*, Q.C. (*Powell*, with them), for the plaintiff. They relied on the rule in *M'Grath v. Bourne* (2), and *Praed v. Graham* (3).

Cur. adv. vult.

April 28.

SIR P. O'BRIEN, L.C.J. :—

This is an action of libel brought by a Mr. M'Carthy, who, judging by the evidence presented in the case, appears to be a respectable solicitor practising in Sligo. I use the word "respectable" advisedly, because no charge of any kind has been suggested against him in the course of the trial, nor has any imputation against him been in any way sustained. He is a gentleman who swears that he is in considerable practice as a solicitor in Sligo, and he brings this action against the defendant, a Doctor Maguire, for libel. Before I refer to the documents which form the subject-matter of the present action, it is necessary shortly to advert to the antecedent relations of the parties to one another. Mr. M'Carthy was the solicitor for the Corporation of Sligo; and, at their instance, he had sued Dr. Maguire on several occasions, five or six in all, in the Civil Bill Court, and before the magistrates; and it appears that, on all these occasions, Mr. M'Carthy had been successful in his conduct of the litigation against Dr. Maguire, the defendant. It appears further that the litigation, or, at least, a portion of it, was of a character which would be calculated to arouse some feeling of hostility on Dr. Maguire's part, for on two occasions the offence for which he was summoned was for being the owner of a house unfit for human habitation; while, on another occasion, the complaint was something to the same effect. On these occasions Dr. Maguire had suffered defeat, and I dare say that the fact of a man being charged, justly or wrongly, with keeping houses belonging to him in a state unfit for human habitation, would be calculated to influence his feelings to a certain extent; certainly it is not the sort of charge that any man would like to see established against him. It was calculated to provoke his animosity

(1) 26 L. R. Ir. 55. (2) Ir. R. 10 C. L. 160. (3) 24 Q. B. D. 53.

Q. B. Div. 1899.

M'Carthy v. Maguire.

Sir P. O'Brien, L.C.J.

against the Corporation of Sligo and against the plaintiff, who on behalf of the Corporation had substantiated the charge.

The plaintiff and defendant were not, it would seem, personally acquainted, and the only connexion between them was, as I have pointed out, that Mr. M'Carthy in his professional capacity had conducted cases successfully against Dr. Maguire in litigation of the character I have mentioned.

I now turn to the correspondence in which the alleged libel is contained. It appears that the accounts of the Corporation of Sligo were being audited; and, on the 21st June, 1898, Dr. Maguire addressed the following letter to the Local Government Board :—

"Gentlemen,—To-day, being the day appointed for auditing the accounts of the Sligo Corporation, I attended at the Sligo Town Hall, and gave the auditor my objections to the law costs incurred during the year 1897. In the bill of Mr. M'Carthy, who always acts as solicitor for the Sligo Corporation, there are several items which are exorbitant; but the auditor said that the bill was taxed by Mr. Coffey, Taxing Master of Her Majesty's High Court of Justice in Ireland, and that he would not reverse Mr. Coffey's taxation. I also said that the fee of £2 2*s.*, allowed to the solicitor for attending the taxation, was extraordinary, and that at page 54 of the Rules of the Supreme Court of Judicature, published in 1893, the fee allowed is 6*s.* 8*d.* for every 100 items, the number of items in Mr. M'Carthy's bill not exceeding 200. There are several items in this bill dealing with cases at petty sessions and at quarter sessions, but all the items are charged and taxed on the scale of the High Court. The most of the bill is made up of charges connected with street preaching in the town of Sligo, and the cost of the extra police in protecting the street preachers. I told the auditor that the Corporation should know, and that Mr. M'Carthy should not give them a different advice, that the Inspector-General, R.I.C., has power to send extra police wherever they are required for protection, and that he can raise the cost of such protection off the district in which they are employed. The auditor said that, as the Corporation had legal advice, and acted accordingly, he could not surcharge the legal adviser costs. If this is the rule for auditing, the legal adviser can give the advice that will give himself most work, and the rate-payers must pay him for doing so. If the Corporation's legal adviser gets paid for such work, anyone in the borough of Sligo who has the misfortune not to be a favourite with the Corporation, or their legal adviser, will consult his own interests best by decamping with little ceremony; but while you have the power I hope you will not compel the rate-payers to pay a solicitor for resisting what should be complied with.

"Yours respectfully,

"Daniel Maguire."

The defendant has not established that a single item in the plaintiff's bill was exorbitant; and, in regard to the fee of two guineas, which the defendant calls "extraordinary," it is only necessary to say that this fee was fixed by the Taxing Master himself, not by the plaintiff, and was fixed by the Taxing Master in the exercise of his own judgment having regard to the nature of the particular work done. This letter, to say the least of it, was a remarkably drastic way of presenting one's view in relation to the possible action of the law adviser of the Corporation; and, as it seems to me, it was a matter to which the jury might properly look in gauging the condition of this gentleman's mind in regard to the plaintiff, with whom he had been in litigation of a character likely to exacerbate his feelings against his successful opponent.

On the 7th July, 1898, the Secretary for the Local Government Board acknowledged the receipt of this letter, and pointed out that the only power possessed by them in regard to a matter of this nature was that provided by section 12 of the Local Government (Ireland) Act, 1871, as amended by section 2 of the Local Government Act, 1872, namely, on the application of persons aggrieved by any allowance or disallowance of an auditor, to decide on the lawfulness of the auditor's reasons for making such allowance or disallowance. The defendant then lodged a complaint, and asked the Board to hold an inquiry, but the Local Government Board declined, saying that they saw no reason for taking any further steps in the matter. Further correspondence followed, to which it is unnecessary to refer at length. Dr. Maguire complained that the abstract of the audited accounts was never published in Sligo; but this, it appears, was a mistake on his part, and was immediately corrected by the Local Government Board, as the abstract was in fact published in the local papers as a supplementary sheet.

The libel itself is contained in a letter from the defendant to the Secretary for the Local Government Board, dated the 3rd November, 1898, which is set out, as follows, in the statement of claim:—

"GENTLEMEN,—With regard to the taxation of the law costs of the Borough of Sligo by your auditor Mr. Barry, in June last, and my correspondence on the matter, I have to inform you that the said bill includes items for work done by

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Mr. M'Carthy, solicitor, in the month of August, 1897. I have further to inform you that I have searched the records of the consolidated taxing-office in the High Court of Justice in Ireland, that there is no record that said bill was ever taxed by Master Coffey, and I believe said bill was never taxed in said High Court by any taxing master. There is a bill between the Sligo Corporation and Mr. M'Carthy recorded in the records of the aforesaid taxing office, but this recorded bill was taxed by Master Mathews, and does not include items of later date than the 16th July, 1897. I request you to inform me whether you will take any steps with regard to the forgery (as it appears to me from searches made) of a certificate of taxation with the forged signature of Master Coffey, which certificate and signature were presented to Mr. Barry at the aforesaid taxation (*sic*) to be valid and genuine.

"Yours faithfully,

"DANIEL MAGUIRE."

This is a very serious indictment. The defendant says that there is no record that the Bill was ever taxed, and that the Bill in his belief was never taxed by any Taxing-Master. But, before this, as it appears, he had himself gone to the Taxing Office in Dublin, on the 3rd November, 1898, and had found it recorded there that these costs had been taxed by Master Mathews, the certificate being signed, in Master Mathews' absence, by Master Tandy. He was thus aware that the Bill, with the additional fee of two guineas for attendance during the taxation, had been in fact taxed; and not only had he this before him, but it further appears that, previously, on the 30th of June, 1898, he had actually seen this very bill of costs, which had been shown to him at his request by Mr. Golden, the treasurer of the Corporation, who was examined as a witness for the plaintiff. Yet he does not hesitate to request the Local Government Board to inform him whether they "will take any steps with regard to the *forgery*" of the certificate of taxation. This is a charge of forgery, and nothing less, against a respectable professional man. The only defence which has been put upon the record is a plea of privilege. It is not denied on the face of the pleadings and must be taken to be admitted that the libel was spoken of and concerning the plaintiff, that it imputed to him an indictable offence, and suggested that he had obtained the money by means of criminal practices. The

defendant brought this charge forward recklessly, relying on a perfunctory rush through the office in Dublin, without taking the trouble to consult anyone, though he himself was without experience or knowledge of the ways of the law. It was his duty, before he made a charge of this nature, to have in the first instance exhausted every reasonable means of information; but that was not the course which he adopted; he chose to rely upon his own crude consideration in the matter, if indeed it is right to use the term "consideration" at all, seeing that he appears to have acted without any consideration whatsoever. The innuendoes set out in the statement of claim have not been traversed, and must, therefore, be taken to be admitted; and the only plea is that of privilege. The case then came on for trial in due course, the only plea upon the record being one of privilege, inartistically and inadequately drawn. Counsel for the plaintiff consented that the plea should be amended. The case was conducted with the greatest moderation by counsel for the plaintiff; they consented to amend the pleadings; they did not ask for vindictive damages; they addressed the jury in the most temperate speeches; and the verdict, found by the jury, was not arrived at without consideration or precipitately, but after an hour's consideration. I assume that there was a privileged occasion. The Judge so ruled as a matter of law; and therefore the question of malice—malice in fact—must of necessity have gone to the jury, and, the jury must have found the existence of express malice. The jury had before them the earlier relations existing between the parties, the circumstances of the litigation in which the plaintiff had appeared as solicitor for the complainants; they had before them the fact that the defendant had been shown, in June, 1898, the very bill of costs in question; that he had come to town and had raced through the offices of the Taxing Masters without consulting any professional man, and that he relied upon this certificate of taxation being a forgery upon the mere faith of some vague stories he had heard or rather said he had heard, in Sligo, the most unsatisfactory grounds conceivable upon which to rest so serious a charge as this. The defendant did not attempt to show that the so-called stories were ever told to him. He did not mention who their author was; nor

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did he in any way show that these stories were anything else than the imaginings of a mind reckless of the obligations of truth.

In such a case as the present, it is always right, in considering the question whether there was absence or presence of malice, to pay attention to the character of the information upon which a person has acted. What have we here? A charge of forgery, made without foundation as is now admitted, a charge of forgery against a respectable professional man, in itself, to my mind, strong evidence of malice. The jury awarded £150 damages. Can this Court say that their verdict cannot be supported? Upon what principle? The trial was conducted most temperately; counsel behaved with moderation; and the case was tried by Mr. Justice Andrews. How then can we say that the damages awarded were so excessive that the verdict must be set aside? The case of *Harris* v. *Arnott* (1) was referred to. I was a party to the judgment of the Court of Appeal in that case. The Lord Chancellor in that case rightly said that the verdict for £1000 was a preposterous one; there was no evidence of actual malice; malice had actually not been found by the jury; and the Judge at the trial (Andrews, J.), had certified that the damages were, in his opinion, excessive. That case, therefore, is no authority whatsoever for setting aside the verdict found by the jury on the trial of the present action. *Harris* v. *Arnott* (1), was a case in which there was an obviously preposterous verdict, in which there was no evidence of malice, but evidence of the merest mistake only. We were also referred to *Praed* v. *Graham* (2). That was a case in which it was sought to set aside a verdict, in an action of libel, as excessive. There Lord Esher said—

"In this case two questions of law have been discussed which I desire to notice. The first question is what is the rule of conduct which should be followed by the Court—either a Divisional Court, or the Court of Appeal—to which an application is made in such an action as an action of libel to set aside the verdict on the ground that the damages given by the jury are excessive? I think that the rule of conduct is as nearly as possible the same as where the Court is asked to set aside a verdict on the ground that it is against the weight of evidence. If the Court, having fully considered the whole of the circum-

(1) 26 L. R. Ir. 55. (2) 24 Q. B. D. 53.

stances of the case, come to this conclusion only :—'We think that the damages are larger than we ourselves should have given, but not so large as that twelve sensible men could not reasonably have given them'—then they ought not to interfere with the verdict. If, on the other hand, the Court think that, having regard to all the circumstances of the case, the damages are so excessive that no twelve men could reasonably have given them, then they ought to interfere with the verdict. If the authorities are looked at, that will be found to be the rule of conduct which the Judges have adopted. If the Court can see that the jury in assessing damages have been guilty of misconduct, or made some gross blunder, or have been misled by the speeches of the counsel, those are undoubtedly sufficient grounds for interfering with the verdict, but they come within the larger rule of conduct which I have laid down, and are grounds which are included in that rule. I think that the proposition said to have been stated by Fitzgerald, B. (1) is equivalent to the one I have stated."

The ground then, so stated, is that a verdict should not be disturbed unless twelve sensible men could not reasonably have awarded the amount. But can we say that the jury in the present instance could not reasonably have found damages to the extent of £150 for this libel, a charge of forgery made against a professional man, maliciously made, without shadow of foundation, especially where no misconduct whatever is attributed to the jury, who acted, as it appears, with the greatest deliberation, after a trial conducted by counsel with conspicuous moderation.

The proposition laid down by the Lord Chief Baron in *M'Grath* v. *Bourne* (1), the leading case on the subject in this country, is this, that the amount must be such that no reasonable proportion exists between it and the circumstances of the case. Some doubts have been expressed at one time whether this rule applied to the case of libel, for libel was supposed to be a matter peculiarly for the jury, the jury being the tribunal to decide upon the existence and to measure the degree of malice; but, in the case I have referred to, *Praed* v. *Graham* (2), Lord Esher, with the concurrence of Lindley and Lopes, L. JJ., states that this rule applies to libel as well as to other cases, and expresses his opinion that the rule as laid down in the Irish case is equivalent to the one that he himself there states.

(1) See *M'Grath* v. *Bourne*, Ir. R. 10 C. L. 160. (2) 24 Q. B. D. 53.

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In the present instance no one can say that the verdict was an unreasonable one, one which twelve sensible and reasonable men could not have found. It is unnecessary to reiterate the facts; they all come to this, that a charge of forgery, and a charge of obtaining the amount of this bill of costs by false pretences, was maliciously made against a professional man, without any shadow of evidence whatsoever. As I have stated, the gross character of the charge afforded intrinsic evidence of malice. We have, upon the finding of the jury, the very gravest charge made through malice. The trial of the case was conducted by counsel most temperately and with the greatest propriety. They assented to all reasonable amendment of the pleadings. They told the jury that they did not ask for vindictive damages. This trial was had before a Judge from whom it is not alleged one disturbing word fell; and the jury acted with wise deliberation, in no hasty, intemperate, or perfunctory spirit. We are clearly of opinion that the verdict cannot be set aside, and that this motion must be refused with costs.

O'Brien, J.:

I concur.

Kenny, J.:

I entirely concur in the judgment of the Lord Chief Justice. Mr. Justice Andrews, who tried this action with a special jury of the city of Dublin, states in his report that he explained to the jury the law of privilege as applicable to the issue, and left them the whole case on the facts. I have no doubt that the question of express malice was not alone present to, but was prominently before, the minds of the jury, inasmuch as it was proved that the plaintiff in his capacity as solicitor to the Corporation of Sligo had, in the course of his professional duty, been obliged on several occasions to take proceedings under the Sanitary Acts against the defendant, and that he had also acted professionally against him on behalf of the Bank of Ireland. I feel assured that they did not leave out of consideration that the very grave charges made in the defendant's letter of the 3rd November, 1898, had little or indeed no foundation, and that the defendant made them, with

knowledge—in his power if not in his very possession—which ought to have shown any man, whose mind was not clouded with malice or perverseness, that the charges were groundless. Furthermore, there was in evidence a subsequent letter of the defendant, dated the 25th November, 1898, in which he said that he hoped to be able to prove that his letter (that is the libel) was true in substance and in fact. I therefore think that there is no ground for entering judgment for the defendant or for setting aside the verdict.

On the question of excessive damages I do not think that I, as a juror, would have given so large a sum as £150, under the circumstances of the case. I might have thought on the evidence that the plaintiff was a respectable solicitor, whose character required but small vindication from the attacks of a gentleman who might not unreasonably be thought to be labouring under an hallucination; but, no matter what conclusion as to the amount of damages I might, under such circumstances, arrive at, I cannot say that the jury have been guilty of misconduct, or that they have made a gross blunder or have been misled into awarding the amount which they have found. The rule as to granting a new trial on the ground of excessive damages, which has been adopted both in this country and in England, is stated by the late Mr. Baron Fitzgerald to be that, to warrant an order for a new trial, the amount "should be such that no reasonable proportion exists between it and the circumstances of the case." In *M'Grath* v. *Bourne* (1) Palles, C.B., recognized this rule; and in *Praed* v. *Graham* (2) it was approved of by Lord Esher, sitting in the Court of Appeal in England. It was subsequently acted on in *Harris* v. *Arnott* (3). Lord Esher's judgment in *Praed* v. *Graham* (2) is a reflex of the condition of my mind in this case:—"The damages are larger than I would have given, but not so large that twelve sensible men could not, looking at all the facts of the case, have given them." In that view of the case, we ought not, in my opinion, to interfere with the amount of damages.

Mr. Justice Boyd, who is engaged in another Court, has

(1) Ir. R. 10 C. L. 160. (2) 24 Q. B. D. 53. (2) 26 L. R. Ir. 55.

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authorized us to state that he concurs in the judgment which we have pronounced.

A. E. R. J.

Appeal. June 2.

The defendant having appealed to the Court of Appeal, the Court (Lord ASHBOURNE, C., FITZ GIBBON, WALKER, and HOLMES, L. JJ.), without calling on counsel for the respondent, dismissed the appeal.

Solicitors for plaintiff: *Milward Jones & Cameron.*
Solicitors for defendant: *Huggard & Willington.*

R. D. M.

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ARRANGING DEBTOR — *Bankruptcy—Arrangement—Failure to pay instalments—Proof by secured creditor who abandoned his security—Right of secured creditor, on failure of arrangement, to set up his security.*] On the 9th April, 1897, *C.* filed a petition for arrangement, and on the 25th May, 1897, carried his second sitting, his offer being 20*s.* in the £1, payable in six instalments. He paid the first instalment of the composition, but failed to pay the second, and was adjudicated bankrupt upon a declaration of insolvency. The *D. Co.* had sold to *C.* certain goods which had not been delivered, as *C.* had not paid for them, but the goods remained in a warehouse, and the *D. Co.* had a vendor's lien on them. On the 26th April, 1897, the *D. Co.* filed a proof in the arrangement for the full price of the goods, and stated that they held no security. After *C.* had been adjudicated, the *D. Co.* filed a proof of debt in the bankruptcy, in which they valued their security at £60 12*s.* 5*d.*, and claimed to prove for the balance of their debt. On motion by the assignees for delivery of the goods:—*Held* (reversing the decision of Boyd, J.), that upon the failure by the debtor to pay the composition notes, the *D. Co.* were remitted to their original rights, giving credit for anything which they received, and that they were entitled to rely on their lien. *In re Campion* - APP. 112

2. —— *Bankruptcy — Arrangement — Judgment creditor—Evidence—Consideration—Proof of debt utilized to carry arrangement—Estoppel.*] *A.*, being desirous of raising a loan for the purpose of consolidating the mortgages on his estate, employed *V.*, a mortgage broker, to obtain the money for him on an agreement in writing that *V.* should receive £3 per cent. commission on the amount of the loan, if he got a firm offer. *V.* entered into negotiations with *W. & Co.*, a firm of solicitors in London, who had a client willing to advance the money, on good title and proper security. *V.* negotiated for some time between the parties, and some of the terms were arranged, when *A.* proposed a larger loan than that originally sought, and the negotiations terminated. *V.* sued *A.* for £1050, the amount of his commission, and though *A.* delivered a defence, he did not appear at the trial. On the 11th

ARRANGING DEBTOR—*continued.*
January, 1895, *V.* obtained judgment for the full amount claimed and costs. On the 12th January, 1895, *A.* presented a petition for arrangement to the Court of Bankruptcy in Ireland, by which he proposed to vest his estate in *M.*, one of the official Assignees (who was to act as receiver and manager over the estate), upon trust, after payment of the rent and outgoings, the costs, and a sum for maintenance to the petitioner, to pay the unsecured creditors till they were paid in full. *V.* proved his debt, and the arrangement was carried—*V.'s* proof being used to carry the arrangement—at the first and second private sittings. In April, 1897, the first dividend was paid to the creditors, including *V.* In February, 1898, a second dividend was about to be paid, when *M.* applied to have *V.'s* proof of debt expunged, as there was no *bona fide* consideration for it.:—*Held* (reversing the decision of Boyd, J.) that, whether there was good consideration for *V.'s* debt or not, *M.* was not entitled to have it expunged, as without it the arrangement under which *M.* had been appointed receiver, could not have been carried, and *M.'s* status as receiver, and his right to represent the creditors depended on the existence of *V.'s* debt. *In re an Arranging debtor; Ex parte Vagg.* - - APP. 383

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CAMPBELL'S (LORD) ACT—(9 & 10 *Vict. c.* 93)—*Amending Act* (27 & 28 *Vict. c.* 95)—*Two actions commenced in respect of the death of the same deceased person—Staying proceedings—Next-of-kin—Administrator.*] The Court will not, in the absence of bad faith, make an order staying an action under Lord Campbell's Act brought by one of the next-of-kin of the deceased within six months after the death, and before administration is taken out, although administration is subsequently taken out by another of the next-of-kin, and a second action in respect of the death of the same deceased person is instituted by the administrator. *Holleran* v. *Bagnell* (4 L. R. Ir. 740), followed. *M'Cabe* v. *Great Northern Railway Co. of Ireland*
[Q.B. 123; APP. 127

CARGO—*Marine insurance—Damage to cargo by perils of sea—Total loss—Notice of abandonment.*] The plaintiff effected a policy of insurance with the defendant Company in the sum of £250 on a cargo of potatoes to be carried by sea from Annalong, in the county of Down, to Southampton, such insurance to be free from particular average. The

CARGO—*continued.*
loading, which commenced on January 27th, 1897, was completed on the 18th February, 1897. There was evidence that the cargo would sprout if kept in the hold for three weeks even though unwet. From adverse weather the vessel carrying the cargo had to put into several intermediate ports. At St. Tudwell's Roads, which she reached on March 11th, she met a gale which caused her to ship water. The vessel arrived at Pwllheli, North Wales, on March 18th, the cargo was examined and found to be sprouting and heated. The ship, from the storm, required some repairs, which could have been executed in a short time, and the defendants requested the captain to proceed with the voyage, which he refused to do. A negotiation took place for the sale of the cargo, but this the Court held did not constitute an admission of liability for a total loss. Offers of £100 and £110 were made for the cargo and refused. Ultimately the captain, who claimed to retain the cargo against freight, sold the potatoes at Pwllheli for £55, the purchaser making a large profit on resale. Formal notice of abandonment was given after the sale, but it was admitted that such notice was too late:—*Held* (1), that the damage to the potatoes was not exclusively and proximately caused by perils of the sea. (2) That even if the damage was so caused, there was no evidence of a total loss, actual or constructive. (3) That even if the potatoes if carried to Southampton would have been a total loss, notice of abandonment under the circumstances was necessary. *Roux* v. *Salvador* (3 Bing. N. C. 266) distinguished. *Cunningham* v. *Maritime Insurance Co.* - - - - - - - - Q. B. 257

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See CUSTOM OF PORT.

CASE STATED—*Landlord and tenant—Land Law (Ireland) Act*, 1896, *s.* 1, *sub-s.* (1) (*a*) (*g*)—*Fair rent—Occupation interest—"Circumstances of the case, holding, and district."*] The Irish Land Commission having at the request of the landlord stated a case for the Court of Appeal, raising the question whether in fixing the fair rent of a holding the Court is bound to assume and to fix the fair rent upon the assumption (*a*) that the annual sum referred to in sub-sect. (1) (*a*) of sect. 1 of the Land Law (Ireland) Act, 1896, is the annual sum at which, after all the circumstances of the case, holding, and district, have been taken into consideration, the holding in the landlord's hands might reasonably be expected to let from year to year to a solvent and prudent tenant who desired to derive a benefit from the occupation of the tenement and not from its sale; (*b*) that the fair rent of the holding referred to in sub-sect (1) (*g*) of sect. 1 of the Land Law (Ireland) Act, 1896, is the annual sum referred to in sub-sect. 1 (*a*) of the same section

CASE STATED—*continued.*
less by a reasonable allowance in respect of the sum which would represent the present annual value of the improvements made by the tenant; the Court of Appeal declined to answer the question on the grounds that it was not a question of law which was within their jurisdiction to determine; that it was an abstract question, the answer to which would not necessarily affect the determination of the fair rent of the holding before the Court, and could not be of general application to other cases: and that the question was ambiguous and indefinite. *Earl of Gosford, Landlord; Blair, Tenant* - - - - - - App. 453

CASES—*Allen* v. *Flood* ([1898] A. C. 1) distinguished - - - - 667, 744
See CONSPIRACY.

—— *Burgess* v. *M'Craith* (unreported) followed [45
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—— *Burton* v. *Newbery* (1 Ch. D. 234) explained
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—— *Ginger, In re; Ex parte London and Universal Bank* ([1897] 2 Q. B. 461) followed and approved - - - - - 206
See BILL OF SALE.

—— *Gordon* v. *Lord Reay* (5 Sim. 274) questioned
See REPUBLICATION. [472

—— *Herbert* v. *Sayer* (5 Q. B. 965) applied
See BANKRUPTCY. [313, 322

—— *Holleran* v. *Bagnell* (4 L. R. I. 740) followed
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—— *Institute of Patent Agents* v. *Lockwood* ([1894] A. C. 347) distinguished 132
See PHARMACY ACTS.

—— *James* v. *Vane* (2 E. & E. 883) followed 34
See COSTS. 1.

—— *Londonderry Union (Guardians of)* v. *Londonderry Bridge Commissioners* (I. R. 2 C. L. 577) followed - - - - 214
See RATES.

—— *Moon* v. *Whitney Union* (3 Bing N. C. 814) considered - - - - 275
See BUILDING CONTRACT.

—— *Moyers* v. *Soady* (18 L. R. Ir. 499) followed
See ARBITRATION. [234

—— *Reg.* (*Cleeland*) v. *Pharmaceutical Society* ([1896] 2 I. R. 368) discussed - 132
See PHARMACY ACTS.

—— *Roux* v. *Salvador* (3 Bing. N. C. 266) distinguished - - - - - 257
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—— *Stanley, In re* (17 L. R. I. 487) not followed
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—— *Taylor* v. *Hall* (I. R. 4 C. L. 467) Dictum of Monahan, C. J. in, disapproved of
See BUILDING CONTRACT. [275

CASES—*continued.*
—— *Temperton* v. *Russell* ([1893] 1 Q. B. 715) followed - - - - 667, 744
See CONSPIRACY.
—— *Vawdrey* v. *Simpson* ([1896] 1 Ch. 166) followed - - - - 234
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See LIBEL.
—— Malicious interference with contracts 667, 744
See CONSPIRACY.
CERTIFICATE — Arbitrators under Tramways Act, 1883—Jurisdiction - - 360
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CHARGING ORDER—Costs—Action in which less than £20 is recovered - - 38
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CHARTER PARTY — Discharge of cargo — Custom of port of Dublin - - 1
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CHEMIST—Pharmaceutical—Company—Firm
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CHILDREN—Cruelty to—57 & 58 Vict. c. 41, s. 19—Notice of appeal—Bail - 310
See CRUELTY TO CHILDREN.
CO-DEBTOR—Levy under *fi. fa.* - - 163
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See FAIR RENT. 4.
COMPROMISE — Matrimonial suit — Order for payment of costs to petititioner's solicitor
See SOLICITOR. [128

COMPULSORY PURCHASE — *The Defence Acts, 1842 to 1873 — Lands Clauses Consolidation Acts — Assessment of compensation for lands compulsorily acquired — "Interest" of land owner — Arrears of rent due — "Incumbrance" — Costs of prior abortive arbitration.*] Arbitrators appointed under the Lands Clauses Consolidation Acts for the purpose of assessing compensation to be paid for lands compulsorily taken for the defence of the realm, *held*, not to be entitled, in assessing the value of the owner's (or reversioner's) interest, to take into account the existence of arrears of rent, due by lessees or tenants, which that taking rendered irrecoverable; nor entitled to award to the owner, as part of the costs of the arbitration, costs of a prior abortive arbitration purporting to be held under the Railways (Ireland) Acts. *In re Kilworth Rifle Range; Secretary of State for War* v. *Countess Kingston* - - - Q. B. 305

CONDITION IN WILL — *Whether precedent or subsequent—Gift of chattels subject to marriage with consent—Executor, assent.*] A testator, by his will, bequeathed his farm and "all stock and chattels thereon" to his son Michael, "provided he marries with the consent of my executors hereinafter named, and gets a substantial fortune with his wife, not less than £250"; and directed that, "in the event of his marrying without such consent," Michael should get one shilling, and that the farm, stock, and chattels should go to the testator's other son Patrick. The testator bequeathed to his wife an annuity of £10 for life, charged on "the said farm and stock"; and to his daughters Alice and Johanna £100 each, and to his daughter Mary £50, "said legacies to be paid to each of my said daughters on the marriage of Michael and out of the fortune he receives with his wife, or upon the marriage of each of my said daughters with the consent of my executors." The testator appointed his son Patrick, and another, executors. The testator died in 1893. Michael continued to live on the farm and work it; he never bought stock, but sold stock, and paid the rent. Patrick lived at some distance. He stated in evidence that he used to go from time to time and look after the farm, and see that the rent was paid; that he took no interest while his mother lived, and that she died about 1895. In December, 1897, Patrick obtained probate of the testator's will, leave being reserved to his co-executor to prove. In 1898 a judgment for £65 damages for breach of promise of marriage was obtained against Michael, and, in obedience to a writ of *fi. fa.* thereunder, the sheriff seized four cows, admittedly some of seven cattle which were on the farm when the testator died, and sold them for auction for £31 5*s.* Patrick was present at the auction, and made no objection; but next day objected, on the ground that they were his property. On interpleader issue, tried before Gibson, J., without a jury, his Lordship held, as a matter of fact, that assent should be presumed from the acts and conduct of the parties, and reported that he regarded the claimant's evidence with distrust; and, being of opinion that the condition was a subsequent one, gave judgment for the execution creditor:—*Held*, by the Queen's Bench Division (Sir P. O'Brien

CONDITION IN WILL—*continued.*
L. C. J., and Andrews, J.; *diss.* O'Brien, J.), that the condition was a condition precedent, and that no interest in the cattle seized vested in Michael until marriage in accordance with the terms of the will, and that the money should be retained in Court until further order to allow of administration proceedings being taken and the rights of all parties protected; and, *held* further, even assuming that the condition was a condition subsequent, and that Michael had a seizable interest in the cattle, the execution creditor could not be held to be entitled to the entire of the proceeds of the sale, but only entitled to be put in the same position as Michael, and that therefore, even so, the money should still be retained in Court in order that it might be ascertained whether, in the course of time, it would cease to be Michael's property. On appeal to the Court of Appeal, *held* (affirming the judgment of the Divisional Court), that the condition was a condition precedent, but that the money should be paid out of Court to Patrick, the executor. *Fitzgerald* v. *Ryan* - - Q. B., 637; [App. 661
—— Gift over, subject to money payment 344
See Limitations, Statute of. 2.
CONDITIONS, STATUTORY — Judicial tenancy—Breach of - - 48
See Waste.
—— Surrender of lease—Land Law (Ireland) Act, 1887, s. 8 - - - - - 41
See Surrender.
CONSIDERATION — Promissory note — Unauthorized renewals - - - 554
See Loan Fund Society. 2.
CONSPIRACY—*Action cause of — Maliciously inducing employee not to continue in his employment—Maliciously procuring breaches of contract—Maliciously preventing persons from entering into contracts—Intent to injure—Interference with trade—Trade Union.*] The plaintiff, who was a butcher at Lisburn, in the county of Antrim, was required by the defendants, who were members of a trade union, called the Journeymen Butchers Assistants' Association, to dismiss from his employment some assistants, who were not members of the defendants' trade union. He declined to do so, but subsequently attended a meeting of the defendants' association, and asked to have his employees admitted to the union, offering to pay all fines and demands against them. The defendants refused to accept this offer, unless some of the plaintiff's employees were punished by being left out of work for twelve months. This the plaintiff refused to do. The defendants thereupon endeavoured to induce some of the plaintiff's employees to leave his service, and succeeded in inducing one of them to do so in breach of his contract of service. The defendants further gave notice to *M.*, a butcher in Belfast, with whom the plaintiff had had large business dealings for twenty years, that, unless he ceased to deal with the plaintiff, they would call out his employees. *M.* telegraphed to the plaintiff not to send any more goods; and in the result the plaintiff's business was practically ruined. On new trial motion in an action for damages for conspiracy:—*Held*, by the Queen's Bench Division (Palles, C. B., dissenting), and, on appeal, by the Court of Appeal, that, notwithstanding *Allen* v. *Flood* ([1898] A. C. 1), an action was sustainable by the plaintiff against the defendants for maliciously conspiring to procure such breaches of contract, and also for maliciously conspiring together to injure him by preventing persons from entering into contracts with him. *Temperton* v. *Russell* ([1893] 1 Q. B. 715) followed. *Leathem* v. *Craig* - Q. B. 667; App. 744
—— To defame—Action for—Inspection of documents—Privilege - - - 199
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CONSULTATION—Motion—Party and party costs - - - - - 29
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CONTINUING PROCEEDINGS — Death of sole plaintiff - - - - 470
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—— Through booking - - - - 375
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CONVERSION OF ESTATE—*Landlord and tenant — Land Purchase Acts — Sale to tenant—Joint application by landlord and tenant for advance by Land Commission of purchase-money—Death of landlord—Subsequent sanction of advance—Land Law (Ireland) Act*, 1881 (44 & 45 *Vict. c.* 49), *s.* 24—*Purchase of Land (Ireland) Act*, 1885 (48 & 49 *Vict. c.* 73), *ss.* 2, 3—*Land Purchase Rules (October*, 1885), *Form No.* 1.] By document in Form No. 1, Land Purchase Rules (October, 1885), an owner in fee of land offered to sell the same to the tenant thereof for a definite sum, which was to be paid by an advance from the Land Commission of that amount under the Purchase of Land (Ireland) Act, 1885 (48 & 49 Vict. c. 73), one-fifth of the advance to be retained as a guarantee deposit under the Act; and by the same document the tenant accepted the offer, and agreed to purchase the holding for the said sum, and requested the Land Commission to advance the same, and agreed that the sale should be carried out by conveyence. This document was signed by the landlord's agent and by the tenant, and was lodged with the Land Commission; soon afterwards the owner died, having by will, made some years previously, devised the lands to his wife for life, with remainder to his two sons, and appointed one of the sons residuary legatee. After the owner's death the Land Commission sanctioned

CONVERSION OF ESTATE—*continued.*
the advance. The sale was carried out by a conveyance from the widow and sons (conveying as "beneficial owners"), which recited the devise, and not the residuary bequest, and that the purchaser held as tenant to them. The Land Commission for several years, with the concurrence of the residuary legatee, and sometimes on his application, dealt with the sale moneys and guarantee deposit on the basis that the devisees were entitled thereto. The son who was not the residuary legatee had died intestate, leaving a widow and several infant children, and limited letters of administration to his estate had been granted to the residuary legatee before the distribution of the sale moneys:—*Held*, by Meredith, J., that there was no binding contract for sale at the death of the testator capable of being specifically enforced; that the document (Form No. 1) was a joint application by the landlord and the tenant for an advance to enable them *to enter into a contract* for sale; that this application was to be regarded not as an application to a Court, but as an application to the Land Commission endowed with, and exercising, the powers formerly exercised by the Board of Works, and the landlord as offering by that document to become surety for the tenant to the extent of the gurantee deposit; that in one sense it was a conditional contract, but that the condition was that the advance was to be made upon the joint application of a living landlord and a living tenant, and that when the testato. died the conditional contract died with him, the condition became impossible of fulfilment, and the Land Commission had no jurisdiction to accept the offer, or make an order on the joint application, or continue the proceedings: that on the facts the devisees had not adopted the contract of the testator with the object of carrying out that contract, and that contract alone; that the parties did not intend to set up the contract of the testator in such a way as to effect a conversion as between the real and personal representatives relating back to the testator's lifetime, but that the devisees finding that the Land Commission were willing to advance the money, entered into a contract with the tenant, and conveyed to him, giving him the same terms as the testator was willing to give; and, *held*, that there was no conversion. *Held*, by the Court of Appeal (Fitz Gibbon and Walker, L. JJ.; Holmes, L. J., *dissentiente*), that the residuary legatee having for several years dealt with the matter on the basis that the lands had passed as land to the devisees, and having carried the sale out on this assumption, could not be allowed to contend that the lands had been converted in his father's lifetime, so as to capture the purchase-money as personalty under the residuary gift as against the children and widow of his deceased brother, whose interests, as his

CONVERSION OF ESTATE—*continued.*
brother's limited administrator, he was bound to protect. *Per* Holmes, L. J. The application for an advance in the prescribed form when sanctioned effected a conversion of the lands. *In re Sherlock's Estate* - - LAND COM., 561; APP. 591

COSTS — *Tender — Payment into Court of the amount tendered with further sum—Severable items —R. S. C. Ir., Ord. XXII., R.* 8.] Where the defendant pleads tender before action brought, and lodges the amount tendered in Court, and also pleads payment into Court of a further sum, in addition to the amount lodged under the plea of tender, in full discharge of the plaintiff's claim, the plaintiff, on drawing the two sums out of Court in satisfaction of his claim, has "recovered in the action" only the excess above the tender, where the defendant's tender was made in respect of specific items in the claim, severable in themselves; and is only entitled to costs accordingly. *James* v. *Vane* (2 E. & E. 883) followed. *Scott's Standard Pneumatic Tyre Co.* v. *The Northern Wheeleries Cycle Manufacturing Co.* - - Q. B. 34

2. —— *Verdict for less than £20—Action of contract—Parties residing in same civil-bill jurisdiction —Proceedings after judgment—R. S. C., Ir., Ord. LXV., R.* 4.] Where the parties in an action of contract reside in the same civil-bill jurisdiction, and the plaintiff recovers less than £20, he is not entitled to the costs of and incident to an order attaching a fund in Court to which the defendant is entitled, or of a motion to make that order fruitful. *Porter* v. *Thompson* - - - Q. B. 38

—— Abortive arbitration—Lands taken under Defence Acts—Compensation - 305
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—— Action to recover possession of land—Question depending on construction of devisor's will
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—— Claim for—Amendment of writ—Motion for judgment - - - - 196
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—— Detinue—Judgment for recovery of specific goods and damages under £5 - 108
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—— Matrimonial suit—Compromise—Order for payment of costs to petitioner's solicitor
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—— Taxation.
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COUNTY COURT—Remitting action to 232
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COVENANT AGAINST ALIENATION—*Landlord and tenant*—2 *Wm.* 4, *c.* 17, *s.* 2—*Land Law* (*Ireland*) *Acts*, 1881 *to* 1896—*Subletting in breach of covenant.*] A lease, made on 7th May,

COVENANT AGAINST ALIENATION—*continued.*
1832, contained a clause permitting the lessee to sublet the premises to one good and solvent tenant, but not to more than one such tenant at the same time, nor in separate parcels, under a penalty. The holding comprised 142 acres. There were two sub-tenants, one holding 9 acres at £10 a-year rent; and the other holding over one acre at £2 10*s.* a-year rent. The lessor resided at a distance of about five miles from the holding. No evidence was given that he knew of the existence of, or consented to, the subletting. *Held*, that the clause in the lease was one controlling or regulating the subletting of the lands demised within the meaning of the 2nd section of 2 Wm. 4, c. 17; that the sublettings being in breach of the contract of tenancy, sect. 7 (1) (*b*) of the Land Law (Ir.) Act, 1896, did not apply; and that the lessee could not be considered as in *bona fide* occupation. The Court refused to presume a lost deed consenting to the sublettings. *De Montmorency, Landlord; M'Adam, Tenant* - - - - LAND COM. 299

CRUELTY TO CHILDREN—*Summary jurisdiction (Dublin Police District)*—7 *Wm.* 4. *&* 1 *Vict. c.* 25—*Appeal—Recognizance—Prevention of Cruelty to Children Act*, 1894 (57 *&* 58 *Vict. c.* 41), *s.* 19—Mandamus.] Where a person is convicted and sentenced, under the Prevention of Cruelty to Children Act, 1894, by a magistrate acting under the special jurisdiction of the Dublin Police District (7 Wm. 4. & 1 Vict. c. 25), and serves notice of appeal to Quarter Sessions, not "at the time of" conviction, though as soon as conveniently possible thereafter, the notice of appeal is good; but there is no power in the magistrate to allow the prisoner out on bail pending the appeal, nor any authority in the Queen's Bench Division, on *mandamus*, to order the discharge from custody of such prisoner undergoing sentence (not set aside) of a competent Court. *Reg.* (*Hegarty*) v. *Divisional Justices, Dublin Metropolitan District* [Q. B. 310

CUSTOM OF PORT—*Dublin—Ship—Charter party—Demurrage—Reasonable despatch.*] There is no established custom of the port of Dublin to discharge cargoes of steamers at an average rate of 350 tons per day, calculated on the whole period of discharge. A charter-party which provides that the cargo is "to be discharged as customary for steamers at port of discharge" is in effect an open charter-party, under which it is the right of the ship and the duty of the consignee to have the cargo discharged with reasonable despatch. The giving of reasonable despatch is a requirement which the consignee is bound to satisfy *de die in diem*. He cannot, by working *extra* hard on one day, entitle himself to idle on another day; and if he has done more than an average quantity at the beginning of the discharge, he cannot on that account relax the measure of reasonable diligence towards the end. *Aberdeen Glen Line Steamship Co.* v. *Macken. The Steamship "Gairloch"* APP 1.

CUSTOM OF PORT—*continued.*

DAMAGES—*Excessive—Libel—New trial.*] The defendant, in a letter addressed to the Local Government Board, asking for an inquiry into the conduct of the plaintiff as solicitor for the borough of S., accused the plaintiff of forging a certificate of taxation, and of obtaining the amount of a bill of costs by false pretences; and, when sued in libel, pleaded privilege. The jury found a verdict for the plaintiff for £150. The evidence showed that the accusation was made maliciously and without any foundation whatever. On new trial motion—*Held*, by the Queen's Bench Division, and, on appeal, by the Court of Appeal, that, the damages awarded "not being so large as that twelve sensible men could not reasonably have given them," the verdict could not be disturbed. *M'Carthy* v. *Maguire* - - - Q. B. 802; APP. 812

—— Action of detinue—Costs - - 108
See DETINUE.

—— Severing—Libel—Joinder of defendants
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DEATH—Lord Campbell's Act—Two actions 123,
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—— of landlord—Pending sale through Land Commission—Subsequent sanction of advance
See CONVERSION OF ESTATE. [561, 591

DEATH OF PARTY TO ACTION—*Practice—Ejectment on the title—Death of sole plaintiff, a tenant for life—Application by remainderman to be substituted as plaintiff—Order XVII., R.* 4.] The plaintiff as tenant for life under an indenture of marriage settlement executed on the occasion of his marriage in 1869, sued, in an action of ejectment on the title, to recover certain lands in the county of Mayo. During the pendency of the suit he died in the year 1895. His eldest son, as tenant in tail in remainder under the settlement, now applied to be substituted as plaintiff in the action:—*Held*, that the applicant did not represent the interest of the plaintiff in the action; that there was no change or transmission of the interest of the plaintiff to the applicant; and, that the application must be refused. *Ferrall* v. *Curran*, - - Q. B. 470

DEBTORS ACT, 1872—*Payment by instalments—Customs pensioner — Pension inalienable.*] An order to pay a judgment debt by instalments will not be made against a Customs pensioner whose only property consists of a pension which is inalienable under the Customs and Inland Revenue Act, 1876, and no part of which has been received by him since the date of the judgment. Such a pension while accruing does not constitute "means" within the meaning of the Debtors Act. *Diss.* Boyd, J. *Governor and Company of the Bank of Scotland* v. *Cunningham* - - Q. B. 780

DEFAULT—Notice of—59 & 60 Vict. c. 26—Service - - - - - - 209
See POLICY OF INSURANCE.

DEFEASIBLE INTEREST — Live stock—*Fieri facias* - - - 637, 661
See CONDITION IN WILL.

DEFENCE ACTS — Assessment of purchase-money - - - - - - 305
See COMPULSORY PURCHASE.

DEMESNE LANDS—*Landlord and tenant—Fair rent—Distinct and substantive part of property held under one demise consisting of demesne—The substantial part of such property—Separation of property into two parts—Diminution of value of landlord's interest—Head landlord—Land Law (Ireland) Act*, 1896 (59 & 60 *Vict. c.* 47), *sect.* 5 (2).] Section 5, sub-section 2, of the Land Law (Ireland) Act, 1896 (59 & 60 Vict. c. 47), provides:—Where a distinct and substantive part of the property held under one demise is demesne land . . . and the Court consider that that part is not the substantial part of such property, the Court may if they are of opinion that, apart from the fixing of a fair rent, the separation of the property into two parts will not diminish the value of the landlord's interest therein, direct that that part shall thenceforth be . . . a separate holding and shall . . . be held at such rent during the continuance of the tenancy as the Court determine to be the proper proportion of the rent reserved by the demise, and the Court may fix a fair rent for the remainder of the property . . . : *Held* by the Land Commission that "the landlord's interest" in the property includes the interest of a head landlord. Lands containing 530 acres and held under lease for one life were sub-demised for the same life. On an application by the sub-tenant to have a fair rent fixed, the Court were of opinion that 70 acres were demesne land. The mansion-house and all the offices were on that portion—a dwelling-house but no offices being on the remainder. On the facts of the case *held* by the Land Commission that, although the 70 acres were a distinct and substantive part of the property, they were not the substantial part of such property; but (principally on the ground that the buildings on the demesne portion were wholly in excess of its requirements as a separate entity, while the remainder was without any offices), that the separation of the property into two parts would diminish the value of the landlord's interest therein, that the case did not come within the sub-section, and that the originating notice should be dismissed:—*Held*, by the Court of Appeal, that, under the circumstances, the separation of the property into two parts would diminish the value of the landlord's interest therein, and that the order of the Land Commission should be affirmed. *Norton, Tenant*; *M'Donnell, Landlord* - Q. B. 51; APP. 70

DEMURRAGE—Custom of port of Dublin—Charter party - - - - - 1
See CUSTOM OF PORT.

DERIVATIVE TITLE—Special indorsement—Motion for judgment - - 45
See SPECIALLY INDORSED WRIT. 1.

DETINUE—*Practice—Costs—Judgment for the recovery of the specific goods, and for damages not exceeding £5—R. S. C., Ir.* (1893), *Order LXV., Rules 3 and 4.*] The provisions of Order LXV. (1893), Rules 3 and 4, limiting a plaintiff's right to costs where he recovers as damages a sum not exceeding £5 in actions of tort, do not apply to an action of detinue in which the goods are recovered in specie. *Bradley* v. *Archibald* - Q. B. 108

DISCOVERY—*Practice—Discovery of documents—Libel—Conspiracy—Inspection of manuscript of the libel—Privilege—Form of affidavit—R.S. C., Ir., Order XXXI., Rule* 13.] Where separate claims for damages for libel against a newspaper proprietor and other defendants are joined with a joint claim against them for the same libel, and also with a joint claim against them for damages for conspiracy to defame and injure, the proprietor of the newspaper, even where he admits publication of an exact copy of the libel, cannot refuse to produce the manuscript of the libel, either on the ground of privilege, or on the ground that its production might tend to incriminate him, if the Court comes to the conclusion that he does not honestly believe that its production will have that effect. To entitle a defendant to refuse discovery on the last-mentioned ground his affidavit must show that he believes the production of the document will tend to incriminate him. *Kelly* v. *Colhoun* Q. B. 199

DISMISSAL—Originating notice—Land Law (Ireland) Act, 1896, s. 50 - 369, 372
See FAIR RENT. 5.

DIVORCE—Compromise of suit—Order for payment of costs to petitioner's solicitor 128
See SOLICITOR.
—— Petition for—Place of trial - - 130
See PLACE OF TRIAL.

DOCUMENTS—Discovery—Libel - 199
See DISCOVERY.

DUBLIN—Custom of port—Discharge of cargo
See CUSTOM OF PORT. [1

EQUITABLE MORTGAGE — *Bankruptcy—Charge and discharge—Debt secured by equitable mortgage—Mortgagor sued by mortgagee—Judgment—Execution—Sale of mortgaged premises by sheriff—Subsequent bankruptcy of mortgagor—Service of notice on sheriff—Lodgment of purchase money in Court—Application for payment out by mortgagee—Right of the assignees.*] A bankrupt, before his adjudication, was in possession of certain houses and premises subject to an equitable mortgage.

EQUITABLE MORTGAGE—*continued.*
The equitable mortgagee sued for the debt, thereby secured, and having recovered judgment issued execution; and the premises were sold by the sheriff for a sum less than the amount of the debt. The existence of the equitable mortgage was not referred to either in the sheriff's auction bill or the conditions of sale. On the following day the purchaser lodged the proceeds of the sale with the sheriff. The adjudication took place four days afterwards, and the sheriff, being served with notice by the assignees, lodged the money in Court. The equitable mortgagee, having filed a charge to have it declared that he was entitled, as equitable mortgagee, to have the money paid out to him:—*Held*, that the equitable mortgagee was not entitled to have the money paid out to him, which he had recovered not as mortgagee, but in the capacity of an unsecured creditor; and that consequently the money should be dealt with under the Bankruptcy (Ireland) Amendment Act, 1872, sect. 54. *In re Keane* [Q. B. (Bankcy.) 798

ESTOPPEL—Proof of debt utilized to carry arrangement - - - - 383
See Arranging Debtor. 2.

EVIDENCE—Substantial part of holding non-agricultural—Land Law (Ireland) Act, 1896, sect. 5, sub-s. 2 - - 99
See Bona fide Occupation.

EXCESSIVE DAMAGES—Libel 802, 812
See Damages.

EXECUTION—Writ of.
See Fieri facias.

EXECUTOR—Payment of legacy to uncertified bankrupt - - - - 313, 322
See Bankruptcy.

EXEMPTION—From rates—Property used for public purposes - - - 214
See Rates.

FAIR RENT—*Agreements and declarations fixing—Taking off the file—Rules, Dec.*, 1883; *Rule* 116.] The Court directed agreements and declarations fixing fair rents, which had been altered after signature by the tenants, and had not been lodged within one month, to be taken off the file. *Kelly, Tenant; Shelton, Landlord. M'Veigh, Tenant; Shelton, Landlord* - - Land Com. 557

2. —— *Improvements—Increased letting value—Allowance to tenant in respect of improvement work—Balance of increased letting value.*] In fixing the fair rent of a holding, the Land Commission adopted the principle that after making a fair and liberal allowance in respect of the tenant's improvement works, the surplus or balance of increased letting value was the property of the landlord and not of the tenant, and that the landlord was entitled to have a fair rent fixed in respect of that portion of his property. Upon a special case asking the question whether the principle, so adopted by the Land Commission, was right in law:—*Held*, by the Court of Appeal (*diss.* Lord Ashbourne, C., Porter, M.R., and Holmes, L.J.), that the question should be answered in the negative, the majority of the Court concurring in formulating the following propositions:—1. That in fixing the fair rent of the holding the tenant was entitled, in respect of the present capital value of his improvement works, to such return by way of annual allowance as the Land Commission should determine to be fair, and sufficient to satisfy the provisions of the Land Law (Ireland) Act, 1881, section 8, sub-section 9. 2. That if the allowance so made was measured by way of percentage, merely upon the present capital value of the tenant's improvement works, or of his expenditure in moneys numbered, labour, and skill, and if, after the allowance so made, any surplus or balance of increased letting value due to his improvements remained, the Land Commission was bound to have regard in dealing with such surplus or balance to the matters hereinafter mentioned. 3. That in fixing the fair rent of the holding and in dealing with the surplus or balance aforesaid, the Land Commission was bound to have regard to the interest of the landlord and tenant respectively, and to consider all the circumstances of the case, holding, and district, including the amount of such surplus or balance, and the sources from which the same was derived; treating the latent or dormant resources of the soil, as let by the landlord to the tenant, as the property of the landlord, and treating the development of those resources by the improvement, as the act of the tenant. 4. That it was within the exclusive jurisdiction of the Land Commission, having due regard to the foregoing principles, to consider and determine whether, and in what proportions, the said surplus or balance should be divided between the landlord and the tenant in fixing the fair rent of the holding. *Per* Lord Ashbourne, C., Porter, M.R., and Holmes, L.J., that the principle adopted by the Land Commission was correct, and that the question submitted should be answered in the affirmative. *Adams, Tenant; Dunseath, Landlord* (No. 2) - - App. 504

3. —— *Jurisdiction—Power to refer to Court valuers—Report—Order, whether bad on its face—* Certiorari—Mandamus.] R. and S., two tenants on the estate of Lord G., having had fair rents fixed by a Sub-Commission, the landlord applied to the Land Commission for a rehearing. Before the cases were reheard, the Land Commission sent down two valuers to inspect the holdings and report. The direction to the Court valuers instructed them to visit the holdings, and if they concurred with the schedule recorded by the Court, and their conclusion as to fair rents, report so on a form supplied; if they saw reason to differ substantially therefrom

FAIR RENT—*continued.*
they were to report on another form, stating concisely, under the respective headings, the matters only as to which they differed and the consequent variations upon which their estimate of the fair rent of the holding had been arrived at. The Court valuers reported, concurring with the schedule of the Sub-Commission. The appeals were heard by the Land Commission who received the evidence offered by landlord and tenants; but the Commission inspected and used the report of the Court valuers; and, in the result, confirmed the rents fixed by the Sub-Commission. *Held*, that the Land Commission acted within their powers in making such reference to the Court valuers, and using their report. The Land Commission made and filed a schedule prescribed by sect. 1 of the Land Law Act, 1896, in the form prescribed by the rules of January, 1897, Form No. 39, in which there was a statement under the heading of "Improvements made by the tenant" of deductions, with the sums allowed, for "Fences" and "Buildings" respectively, without further particularising these improvements; and a statement that the holding was subject to the Ulster Tenant-right Custom, but that no special deduction had been made when fixing a fair rent on account thereof:—*Held*, that the order of the Land Commission was good on its face as sufficiently complying with sect. 1 of the Land Law Act, 1896. *Reg.* (*Earl of Gosford*) v. *Irish Land Commission* - APP. 399

4. —— *Occupation interest—Holding in the landlord's hands.*] The ascertainment of a fair rent under the Land Law (Ireland) Act, 1896, sect. 1, sub-sect. (1), (*a*) should not proceed upon the basis that the holding is *in the landlord's hands* free from any tenancy and available for letting to a solvent and prudent tenant desirous of acquiring a permanent as distinguished from a temporary tenancy; inasmuch as the assumption that the holding is in the landlord's hands would necessarily involve the element of competitive value, which ought to be excluded in estimating a fair rent. No deduction is to be made from such rent in respect of occupation interest. *Ripley, Tenant; Macnaghten, Landlord* - - - - LAND COM. 446

5. —— *Renewal of application—Land Law (Ireland) Act, 1896, sect. 50.*] The effect of sect. 50 of the Land Law (Ireland) Act, 1896, is that an application to fix a fair rent which failed under the earlier Acts is not to be dismissed, if brought forward again, merely because it was not sustainable, or was dismissed, under the previous law. But the section does not allow a proceeding to be brought a second time merely for the purpose of having a re-trial of a question of fact, upon which the law has not been altered. *Buccleugh* (*Duke of*) *and another, Landlords; Rainey, Tenant*
[LAND COM. 369; APP. 372

FAIR RENT—*continued.*
—— Future tenant—Agreement by limited owner
See FUTURE TENANT. [622
—— Principle of assessment—Case stated—Appeal—Abstract question—Refusal of Court to answer - - - - - - 453
See CASE STATED.
—— Separation of demesne lands from others included in demise—Land Law (Ireland) Act, 1896, p. 5 (2) 51, 70, 99, 174, 179
See BONA FIDE OCCUPATION.
DEMESNE LANDS.
RESIDENTIAL HOLDING. 2.
—— Subdivided holding—Land Law (Ireland) Act, sect. 5 (3) - - - - 81, 88
See SUBDIVISION.
—— Tenants' improvements — Board of Works Loan - - - - - 229
See IMPROVEMENTS.
FIAT—Judge of Assize - - - 360
See TRAMWAY.
FIERI FACIAS—Levy under—Defeasible interest—Live stock - - 637, 661
See CONDITION IN WILL.
—— Levy under—Statute of Limitations — Part payment - - - - 163
See LIMITATIONS, STATUTE OF. 1.
—— Sale under—Equitable mortgagee — Bankruptcy of mortgagor - - 798
See EQUITABLE MORTGAGE.
—— Withdrawal of seizure by direction of plaintiff—Fees, charges, and expenses - 546
See SHERIFF.
FIRM—Of legally qualified pharmaceutical chemists—Apprentice—Regulations 132
See PHARMACY ACTS.
FISHERY ACTS—*Fixed nets—Inquiry as to title*—Mandamus—26 & 27 *Vict. c.* 114, *sect.* 140.] The Inspectors of Irish Fisheries granted a certificate in 1880 to *F. C. B.* of his right to use a fixed bag net in the river Sneem. In 1883 a lease of the fisheries in the river Sneem was made to "The Sneem (Co. Kerry, Ireland) Oyster and Salmon Fisheries Company, Limited," for twenty-one years from November 1st, 1882. A transfer of the certificate to *J. F. B.*, then the manager of the Company, was signed by the Inspectors in 1889. The lands in connexion with which the fishery was enjoyed were purchased in the Landed Estates Court in 1891 by the prosecutors. Shortly afterwards the Company went into liquidation, and was dissolved on the 17th June, 1893; and thereupon the lease granted in 1883, was struck out of the Landed Estates Court rental, and was not referred to in the conveyance to the prosecutors. The liquidator of the Company declined to execute a surrender of the lease after the dissolution of the Company. The original owners, by deed dated the 14th July, 1893, granted to the prosecutors the

FISHERY ACTS—*continued.*
above-mentioned fisheries and the right to use the fixed net. In April, 1897, an application was made to the Inspectors for a transfer of the certificate to the prosecutors, but the Inspectors refused to comply with this request until they should be satisfied that the lessee's interest in the lease of 1883 had determined. On an application to make absolute a conditional order directing the Inspectors to execute the required transfer to the prosecutors: *Held*, that inasmuch as section 16 of 32 & 33 Vict. c. 33, imposing a penalty, necessitates the obtaining of a certificate, mandamus will lie, notwithstanding the provisions of section 40 of 26 & 27 Vict. c. 114, to compel the Inspectors of Irish Fisheries to hold an inquiry into an applicant's claim for such certificate. *Reg.* (*Warden*) v. *Inspectors of Irish Fisheries* - - Q. B. 21

FIXED NET—Inquiry as to title—*Mandamus*
See FISHERY ACTS. [21

FORFEITURE—Policy of insurance—Notice of default - - - - - 209
See POLICY OF INSURANCE.

FRANCHISE—Parliamentary - - 354
See PARLIAMENT.

FRAUD—Allegation of — Arbitration clause — Motion to stay proceedings in action 234
See ARBITRATION.

FUTURE TENANT—*Landlord and tenant—Contract that tenant was to have the benefit of future legislation—Land Law* (*Ireland*) *Act*, 1896, *ss.* 10, 17, 18.] By agreement dated the 31st August, 1886, made between *B.* and *M.*, after reciting that *M.* had proposed to *B.* to become his future tenant for the term and at the rent thereafter mentioned of portion of the lands of *K.* previously occupied by *M.*, *B.* agreed to let the said lands to *M.* for the term of twenty-one years from the 1st May, 1886, at the rent of £27 10*s.* The agreement further provided that in the event of any Act of Parliament being passed whereby tenants holding under leases theretofore made should have extended to them the benefits of the Land Law (Ireland) Act, 1881, or any other Act to be passed dealing with the relationship of landlord and tenant in Ireland where tenants hold under lease, it was agreed that *M.*, his executors, administrators, or assigns should, in respect of the lands and the tenancy thereby created, be entitled to the benefit of any Act so to be passed. At the date of the agreement *B.* was tenant for life of the lands. *B.* died, and was succeeded by his son as tenant in tail in remainder. On the 15th October, 1896, *M.* served notice to fix a fair rent. The provisions contained in the Rules of 1897, Rr. 164–170, had not been complied with:—*Held* (reversing the decision of the Land Commission), that the tenant was not entitled to have a fair rent fixed. *M'Carthy, Tenant; Bennett, Landlord*
[App. 622

GIFT OVER—Subject to money payment—Accrual of right of action - - 344
See LIMITATIONS, STATUTE OF. 2.

HARBOUR—Property used for public purposes—Rating - - - - - 214
See RATES.

HOLDING—Character of—Change in - 615
See RESIDENTIAL HOLDING. 1.

—— Character of—Home farm - 785, 791
See HOME FARM.

—— "In landlord's hands"—Fair rent—Occupation interest - - - - - 453
See CASE STATED.

—— Partly non-agricultural—Land Law (Ireland) Act, 1896, sect. 5, sub-s. 2. [51, 70, 99, 174, 179
See BONA FIDE OCCUPATION.
DEMESNE LANDS.
RESIDENTIAL HOLDING. 2.

—— Subdivision—Land Law (Ireland) Act, 1896, sect. 5, sub-s. 3 - - - 81, 88
See SUBDIVISION.

HOME FARM—*Landlord and Tenant—Land Law Acts*, 1881–96—*Character of holding—Land Law* (*Ireland*) *Act*, 1896, *sect.* 5, *sub-sect.* (1) (*b*) (i).] *J. M.*, a landed proprietor in the county of Tipperary, farmed his own lands, comprising 600 or 700 acres. The lands consisted of the demesne round the mansion-house of 50 acres, and six other farms which varied in size from 80 to 150 acres; and portion of the produce of these farms in question was used in connection with the mansion-house. He died in 1865, leaving a widow and four minor children; and after his death his widow broke up the establishment, and went to reside abroad, and the farms, with one exception, were let to tenants. One of these, containing 87 acres (Ir.), was let by Mrs. *M.* to *S.* by agreement dated the 4th December, 1866, by which *S.* agreed to become tenant from year to year at the rent of £122, and to keep the buildings in repair, and to reside on the farm. In 1879 *T. K. M.*, the eldest son of *J. M.*, came of age, and served notice to quit upon *S.*; but he afterwards withdrew this notice. In 1881 *S.* served notice to fix a fair rent, to which the landlord replied by serving a notice to fix a fair rent, demanding an increase of rent, and notice that, it being an English managed estate, the permanent improvements were the landlord's, and a notice to fix a specified value. The originating notice was dismissed on the ground that the holding was a pasture letting valued at over £100 a-year. After the passing of the Land Act of 1896 the tenant served a fresh originating notice; and the Sub-Commission having fixed a fair rent, the Land Commission reversed this decision, and dismissed the originating notice on the ground that the holding was a home

HOME FARM—*continued.*
farm:—*Held* (reversing the decision of the Land Commission) that the holding was not a home farm. *Sullivan, Tenant; Marshall, Landlord* [LAND COM. 785; APP. 791

HUSBAND AND WIFE—Matrimonial suit—Compromise—Costs of petition - 128
See SOLICITOR.

—— Matrimonial suit—Place of trial - 130
See PLACE OF TRIAL.

IMPROVEMENTS—*Landlord and Tenant—Land Law (Ireland) Acts, 1881–1896—Fair rent—Board of Works loan.*] A landlord, at the request of his tenants, borrowed from the Board of Works money which was expended by the tenants in making drains; and they paid him, during the period required for the repayment of the loan, not only the interest payable to the Board of Works, but also a sum equivalent to the sinking fund, till the entire was repaid:—*Held*, that the improvements were tenants' improvements. *Doody and Others, Tenants; Jones Westby, Landlord* [LAND COM. 229

—— Allowance for—Fair rent - - 504
See FAIR RENT. 2.

INCREASED LETTING VALUE—Fair rent
See FAIR RENT. 2. [504

INHABITANT HOUSEHOLDER — Occupation as tenant — Agreement between next-of-kin - - - - - 354
See PARLIAMENT.

INQUIRY—Title to fixed net—*Mandamus* 21
See FISHERY ACTS.

INSTALMENTS—Order to pay by—Customs' pensioner - - - - - 780
See DEBTORS' ACT, 1872.

INSURANCE.
See POLICY OF INSURANCE.

INTENTION—Malice—Conspiracy 667, 744
See CONSPIRACY.

INTERPLEADER—Summons—Service out of the jurisdiction - - - 381
See SERVICE OUT OF THE JURISDICTION. 2.

IRREGULARITY—Agreements fixing fair rent—Taking off file - - - - 557
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—— Amendment of writ—Claim for costs 196
See SPECIALLY INDORSED WRIT. 2.

JOINDER—Parties—Cause of action—Libel
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JOINT TENANTS—Subdivided holding—Land Law (Ireland) Act, 1896, sect. 5, subs. 3 - - - - - - 81, 88
See SUBDIVISION.

JUDGMENT—Action of detinue—Costs 108
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—— Levy under *fi. fa.*—Part payment—Co-debtors—Statute of Limitations - - 163
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—— Motion for—Action to recover possession for non-payment of rent—Special indorsement—Derivative title - - - - 45
See SPECIALLY INDORSED WRIT. 1.

—— Motion for—Amendment—Claim for costs
See SPECIALLY INDORSED WRIT. 2. [196

—— Proof of debt—Application to expunge—Arrangement—Estoppel - - 383
See ARRANGING DEBTOR. 2.

—— Recovered by equitable mortgagee—Sale under *fi. fa.*—Bankruptcy of mortgagor 798
See EQUITABLE MORTGAGE.

JUDICATURE ACT—S. 53—Action to recover possession—Question arising upon construction of will devising lands - 344
See LIMITATIONS, STATUTE OF. 2.

JURISDICTION—Court of Appeal—Case Stated by Land Commission - - 453
See CASE STATED.

—— Land Commission—Fixing fair rent—Valuers—Report - - - - - 399
See FAIR RENT. 3.

—— Service out of - - - 233, 375, 381
See SERVICE OUT OF THE JURISDICTION. 1–3.

JURY—*Action—Special jury obtained by the plaintiff—Verdict for defendant—Plaintiff without means—Personal liability of the plaintiff's solicitor for jury fees—Juries Act, 1871, section 37.*] The plaintiff in this action served notice for, and obtained, a special jury. The jury found a verdict in favour of the defendant. It appeared in the course of the trial that the plaintiff was almost without means, and that she had given a mortgage to her solicitor, upon whatever property she had, to secure her solicitor's costs:—*Held*, by the Judge at the trial (Gibson, J.), that he had jurisdiction, under the circumstances, to order the plaintiff's solicitor personally to pay the jury fees. *Monserratt* v. *Scott* [GIBSON, J., 551

JUSTICES—Loan Fund Society—Renewal of note—Summary jurisdiction - 119
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—— Prevention of Cruelty to Children Act, 1894—Appeal—Bail - - - 310
See CRUELTY TO CHILDREN.

JUSTIFICATION—Slander—Remitting action to County Court - - - 232
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LAND LAW (IRELAND) ACTS—Agreements and declarations fixing fair rents—Alterations after signature—Lodgment after prescribed time—Taking off file 557
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LAND LAW (IRELAND) ACTS—*continued.*
—— Appeal—Case Stated—Abstract question—Want of jurisdiction - - 453
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—— *Bona fide* occupation—Subletting in breach of covenant - - - - - 299
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—— Character of holding—Change in - 615
See RESIDENTIAL HOLDING. 1.
—— Dismissal of originating notice—Land Law (Ireland) Act, 1896, s. 50 - 369, 372
See FAIR RENT. 5.
—— Fair rent—Competitive value—Occupation interest - - - - - - 446
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—— Fair rent—Improvements—Increased letting value - - - - - - 504
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—— Future tenant—Agreement by limited owner
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—— Home farm - - - - - 785, 791
See HOME FARM.
—— Improvements—Board of Works' Loan—Repayment by tenants—Fair rent 229
See IMPROVEMENTS.
—— Jurisdiction—Valuers—Report - 399
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—— Non-agricultural lands included in demise—Separation for purposes of fixing fair rent of residue—Diminution of value of landlord's interest - 51, 70, 174, 179
See DEMESNE LANDS.
RESIDENTIAL HOLDING. 2.
—— Non-agricultural lands the substantial part of holding—Evidence—*Bona fide* occupation—Land Law (Ireland) Act, 1896, s. 5, sub-s. 2 - - - - - - 99
See BONA FIDE OCCUPATION.
—— Sale to tenant—Death of landlord—Subsequent sanction of Land Commission to advance - - - - - 561, 591
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—— Statutory conditions—Breach of—Staying proceedings - - - - - 48
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—— Subdivision of holding—Unity of possession—Joint tenants or tenants in common
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—— Surrender of lease - - - - 41
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LANDLORD AND TENANT—Action to recover possession—Special indorsement 45
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—— Conversion of estate—Sale through Land Commission—Sanction of advance after landlord's death - - 561, 591
See CONVERSION OF ESTATE.

LANDLORD AND TENANT—*continued.*
—— Land Law (Ireland) Acts.
See LAND LAW (IRELAND) ACTS.
—— Lease.
See LEASE.

LANDS CLAUSES' ACT.
See COMPULSORY PURCHASE.

LEASE—Covenant against alienation—Subletting
See COVENANT AGAINST ALIENATION. [299
—— Non-agricultural lands included in—Separation—Land Law (Ireland) Act, 1896, s. 5 (2) - - - - - 51, 70, 99
See BONA FIDE OCCUPATION.
DEMESNE LANDS.
—— Surrender—Conditions—Land Law (Ireland) Act, 1887, s. 8 - - - - 41
See SURRENDER.

LEGACY—Payment to uncertified bankrupt
See BANKRUPTCY. [313, 322

LIBEL—*Practice—Parties—Joinder of defendants—Separate causes of action—Claim for damages—Action of libel—R. S. C. Ir. Order XVI., Rule 4—Law of Libel Amendment Act*, 1888 (51 & 52 *Vict. c.* 64).] In an action for libel by the plaintiff against three defendants, *A.*, *B.*, and *C.*, *A.*, one of the joint owners, and *B.*, the publisher, of the newspaper containing the libel, delivered a joint defence traversing all the allegations in the statement of claim, and pleading fair comment. *C.*, the other joint owner of the newspaper and the writer of the libel, delivered a similar defence, and counterclaimed for a libel published by the plaintiff against him. At the trial, the jury found a verdict for the plaintiff, with £110 damages, and they apportioned the damages, by permission of the Judge, between the three defendants—£100 against *C.*, and £5 each against *A.* and *B.*; they also found a verdict of sixpence damages on the counterclaim for the defendant *C.*:—*Held*, in the Queen's Bench Division, by Andrews and Boyd, JJ., and by the Court of Appeal, that the jury had no power to sever the damages, and that the judgments entered in accordance with the verdict should be set aside, and a new trial directed. *Held*, also, by the Queen's Bench Division, that the damages were excessive. *Dawson* v. *McClelland and others*
[Q.B. 486; APP. 494
—— Excessive damages - - 802, 812
See DAMAGES.
—— Manuscript—Discovery - - 199
See DISCOVERY.

LIMITATIONS, STATUTE OF—*Part payment—Judgment—Levy of part of demand*—Fi. fa. *—Co-debtors.*] Where a judgment was obtained in 1884 against *A.* and *B.*, and in 1886 part of the judgment debt was levied under an execution against *A.*:—*Held*, that this was sufficient to keep

LIMITATIONS, STATUTE OF—*continued.*
the debt alive against *A.* and *B.* for a further period of twelve years, and that within such period the judgment creditor was entitled to an order for liberty to issue execution against *B.* *Brew* v. *Brew* [Q.B. 163

2. —— *Will—Construction—Gift over subject to money payment*—3 & 4 *Wm.* 4, *c.* 27, *ss.* 3, 4—*Accrual of right of action — Ejectment — Costs — Judicature (Ireland) Act*, 1877, *s.* 53.] A testator, who died in 1863, devised freeholds to his wife *B.* and his daughter *J.*, to hold jointly during *B.'s* life, and after *B.'s* death to *J.* in fee, "provided always, that if my said wife (*B.*) should ever get married, she shall forfeit and lose all claim and title to any of my property on receiving the sum of £50." Testator's widow *B.* was married again in 1874. *J.* came of age in 1879, and died intestate and unmarried in 1897. In 1898 the plaintiff (the heir-at-law both of *J.* and of the testator) tendered £50 to *B.*, and demanded possession of the land: and on *B.'s* refusal brought an action of ejectment against her and her husband. The action was tried before a Judge and jury, and, it not being suggested that there was any question of fact proper to be left to the jury, the Judge directed a verdict for the defendants, on the ground that the election to take advantage of the forfeiture should have been exercised within a reasonable time. On new trial motion:—*Held*, that the right of action only accrued in 1898, upon the tender of the £50, and that (on lodging this amount in Court) the plaintiff was entitled to recover possession of the lands. *Held*, further (*diss.* O'Brien, J.), that, inasmuch as the action was in substance an action to determine a question of difficulty on the construction of the will of a person through whom both parties claimed, which raised the substantial question in the case—a question for the Judge at the trial, both sides admitting that there was no question for the jury—both parties should abide their own costs of the trial and argument. *Connolly* v. *Leahy* Q. B. 344

—— Payment on unauthorized renewals — Loan Fund Society - - - - 554
See LOAN FUND SOCIETY. 2.

LIMITED OWNER.
See TENANT FOR LIFE AND REMAINDERMAN.

LOAN FOR IMPROVEMENTS—Repaid by tenants—Fair rent - - 229
See IMPROVEMENTS.

LOAN FUND SOCIETY — *Loan Fund Act*, 1843 (6 & 7 *Vict. c.* 91, *ss.* 24, 27, 30)—*Statutory loan by Loan Fund Society—Renewal of outstanding note.*] A renewal being contrary to the provisions of the Loan Fund Act, 1843, a renewal note cannot be sued upon under that Act. *Skey* v. *Shiels* [Q. B. 119

LOAN FUND SOCIETY—*continued.*

2. —— *Loan Fund Act*, 1843 (6 & 7 *Vict. c.* 91)—*Statutory loan by Loan Fund Society—Renewal of outstanding note—Unauthorized advance—Remedy by civil bill—Statute of Limitations.*] Though a renewal note cannot be enforced under the Loan Fund Act, an action can be maintained by the trustess or receiver upon the original consideration, where the primary note cannot be enforced before Justices; and payments made on foot of invalid renewals, can be utilized to keep alive the original liability. *Lindsay* v. *Maguire* - Q. B. 554

MALICE—Interference with contracts—Conspiracy - - - - - 667, 744
See CONSPIRACY.

MANDAMUS—Fishery Inspectors—Fixed net—Inquiry as to title - - - 21
See FISHERY ACTS.

—— Land Commission - - - 399
See FAIR RENT. 3.

—— Prevention of Cruelty to Children Act, 1894—Bail pending appeal - - 310
See CRUELTY TO CHILDREN.

MARINE INSURANCE—Cargo - 257
See CARGO.

MARKET—*Tolls—Sale of milk within limits of city of Londonderry—Londonderry Improvement Act*, 1896 (59 & 60 *Vict. c. ccxlix*).] By a local Act (59 & 60 Vict. c. ccxlix) for the establishment and regulation of markets in the borough of *L.*, it was provided that it should be lawful for the Corporation from time to time to demand from any person bringing into the existing or any future market place, or building or ground connected therewith, any marketable commodity specified in Schedule B, such tolls as the Corporation should from time to time appoint, such tolls to be supplementary to the tolls in the L. Improvement Act, 1848; "and all tolls payable under the L. Improvement Act, 1848, and under this Act shall be payable to the Corporation on all marketable commodities specified as the subject of toll thereunder, notwithstanding that the whole or the bulk of such marketable commodities sold or offered for sale may not have been brought into the market or buildings or ground connected therewith, or be within the city, at the time of such sale or offer for sale, if such sale or offer for sale was in fact made by sample or otherwise within the city, provided always that the tolls aforesaid shall not be payable if the sale be made in the dwelling-house or shop of the person making such sale." The tolls in Schedule B included swee milk. The defendant, who resided a few miles outside the city of *L.* was in the habit of sending into the city sweet milk for sale every day (except Sundays) to customers of his who took milk from him regularly. The defendant's servant, who delivered the milk, took with him daily some extra

MARKET—*continued.*
supply in case the regular customers wanted some extra amount, and if they did not he would sell it to anyone who asked it from him, in case he had it. None of the milk was sold in the market:—*Held* (affirming the decision of the Queen's Bench Division) that the defendant was liable to pay toll on milk. *Corporation of Londonderry* v. *Moore* App. 247

MARRIAGE—Condition as to—Whether precedent or subsequent—Will—Construction
See Condition in Will. [637, 661

MASTER AND SERVANT—Maliciously inducing employee not to continue in his employment - - - 667, 744
See Conspiracy.

MIDDLEMAN—Surrender of lease—Land Law (Ireland) Act, 1887, s. 8 - - 41
See Surrender.

MILK—Sale from door to door—Londonderry Improvement Act, 1896—Market 247
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MORTGAGE—Equitable—Bankruptcy of mortgagee—Sale under *fi. fa.* - 798
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OCCUPATION — *Bona fide* — Sub-letting in breach of covenant—Land Law (Ireland) Act, 1896, s. 7 (*b*) - - - 299
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—— —— XI., Rule 1 - - - 233, 375, 381
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—— —— LXXXIV., Rule 2 - - - 196
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—— —— LXXXVI., Rule 1 - - - 381
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ORIGINATING NOTICE—Fair rent—Dismissal—Land Law (Ireland) Act, 1896, s. 50 - - - - - 369, 372
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PARLIAMENT—*Franchise—Inhabitant householder—Occupation as tenant—Father of claimant dying intestate—Rent receipts given to claimant—Consent of other next-of-kin—Agreement—Joint or sole occupation.*] The tenant of a farm died intestate, leaving a son *B.* and two daughters his sole next-of-kin, who resided together on the farm which they worked, and were supported out of the produce. For two years *B.* obtained in his own name receipts for the rent of the farm. An agreement was given in evidence on behalf of *B.*, dated the 13th July, 1896, by which, after reciting that he had been, with the consent of his sisters, accepted as tenant of the farm, his sisters agreed to abandon all claims they might have, or might have had, as next-of-kin of their father, or otherwise, on the farm:—*Held*, that *B.* was in occupation of the premises as tenant, and entitled to the franchise. *Gibson* v. *Riddell* - - - - APP. 354

PARTIES—Action to recover possession of land—Death of sole plaintiff - - 470
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—— Joinder—Libel—Separate causes of action
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PAYMENT—Gift over on—Will—Accrual of right - - - - - - 344
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PERILS OF THE SEA—Damage to cargo—Insurance - - - - - - 257
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PHARMACY ACTS — (38 & 39 *Vict. c.* 57 53 & 54 *Vict. c.* 48)—*Apprenticeship—Apprenticeship to a limited liability Company carrying on business as pharmacists—"Firm of legally qualified pharmaceutical chemists"—Statute—Regulations having, when duly approved of, the effect of statute—Subsequent statutory recognition of regulations which, when made, were* ultra vires.] The Pharmacy (Ireland) Act, 1875, which created the Pharmaceutical Society of Ireland, gives power to the Council of that body to make regulations in regard

PHARMACY ACTS—*continued.*
to the examination of candidates, and "generally for all such other matters as may be necessary for the due execution of this Act." By sect. 17, "all regulations made under the authority of this Act," when approved of by the Lord Lieutenant and Privy Council, and laid before Parliament, become "of the like force and effect as if they had been enacted in this Act." The Act then provides that examinations shall be held at which "all persons desirous of being registered as pharmaceutical chemists under the Act" may present themselves at such times, and in such manner as may be prescribed by such regulations, and provides that every person who shall be duly examined in accordance with the provisions of the Act, and shall be certified by the examiners as qualified, shall be entitled to be registered under the Act as a pharmaceutical chemist. The Council made regulations, which were duly approved of and laid before Parliament, requiring that candidates for the qualifying examination should produce a statutory declaration, signed by a pharmaceutical chemist, that such candidate had served as apprentice or assistant for four years, "with, and in the sole employment of such pharmaceutical chemist . . . or of a firm of legally qualified pharmaceutical chemists . . . of which the aforesaid pharmaceutical chemist is a member." These regulations also required that a similar statutory declaration be made by the candidate. The Pharmacy (Ireland) Act, 1890, sect. 10, provides that every person who shall serve an apprenticeship to a registered chemist and druggist, or a registered druggist not being a pharmaceutical chemist, and who "in addition shall have served an assistantship of two years to a pharmaceutical chemist," shall be entitled to present himself for examination under the Act of 1875 "as a pharmaceutical chemist," and on passing his examination to be registered as a pharmaceutical chemist. *C.* served an apprenticeship of over four years in the employment, for the greater portion of that period, of a registered pharmaceutical chemist, and, as regards the residue of that period, in the employment of a limited liability company carrying on business as pharmaceutical chemists, of which company all the members were, and under its articles of association were required to be, registered pharmaceutical chemists. *C.* presented himself for examination in order to qualify to be registered as a pharmaceutical chemist; and, the Council having refused to admit him to the examination, he applied for a mandamus:—*Held*, that this company was "a firm of legally qualified pharmaceutical chemists" within Regulation III.; that *C.*, having complied with the Rules of the Society as to apprenticeship, was entitled to present himself for examination; and that the mandamus must issue: *Reg.* (*Cleeland*) v. *Pharmaceutical Society* ([1896] 2 Ir. R. 368)

PHARMACY ACTS—*continued.*
discussed. *Held,* further (per Palles, C. B., and O'Brien, J.), that the regulation as to apprenticeship was repugnant to the provisions of the Act of 1875, and therefore *ultra vires* when made, and that, upon the construction of this Act (sect. 17, notwithstanding), it was competent to the Court to entertain and determine the question of its validity: *Institute of Patent Agents* v. *Lockwood* ([1894] A. C. 347), distinguished; but *held,* further, that the effect of the statutory recognition contained in the enactment of section 10 of the Act of 1890, was to render the regulation valid and binding. *Reg.* (*Conyngham*) v. *Pharmaceutical Society of Ireland* [Q. B. 132

PLACE OF TRIAL—*Practice.*] A petition for divorce *a mensa et thoro* may be sent down for trial to an assize town. *Gorman* v. *Gorman* [Q. B. (MAT.) 130

PLEADING—Payment into Court—Severable items—Costs - - - - - 34
See COSTS. 1.

POLICY OF INSURANCE—*Life Assurance Company—The Collecting Societies and Industrial Assurance Companies Act,* 1896 (59 & 60 *Vict. c.* 26), *ss.* 3, 16—*Notice of default before forfeiture—Mode of service.*] Notice of default before forfeiture of an insurance policy, as required by section 3 of the Collecting Societies and Industrial Assurance Companies Act, 1896, is well served, within section 16 of that Act, if sent by post addressed to the assured at his last known place of abode. *Morgan, Appellant; M'Clure, Respondent* [Q. B. 209

—— Cargo—Damage by perils of sea—Total loss—Notice of abandonment - - 257
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—— Appeal—*Ex parte* order—Motion to set aside [233
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—— Case stated by Land Commission—Abstract question—Refusal of Court of Appeal to answer - - - - - - 453
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—— Costs — Action of detinue — Judgment for return of goods and damages under £5 [108
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—— Costs—Action to recover possession of land—Question arising on construction of devisor's will - - - - - 344
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—— Costs—Charging order—Action in which less than £20 is recovered—Parties resident within same civil bill jurisdiction 38
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—— Costs — Party and party — Motion — Three counsel—Fees to counsel—Refreshers [619
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—— Costs — Party and party — Motion — Three counsel—Fees to counsel—Settlement of affidavits—Consultation - - 29
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—— Costs — Tender — Payment into Court of amount tendered and further sum 34
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—— Death of sole plaintiff—Substitution—G. O. XVII., R. 4 - - - - - 470
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—— Debtors' Act, 1872—Pension of retired Customs officer - - - - - 780
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—— Discovery of documents—Libel—Privilege—Affidavit - - - - - 199
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—— *Fieri facias*—Levy under—Defeasible interest in live stock - - - 637, 661
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—— *Fieri facias*—Sheriff's fees, charges, and expenses - - - - - - 546
See SHERIFF.

—— Interpleader—Summons—Service out of the jurisdiction - - - - - 381
See SERVICE OUT OF THE JURISDICTION. 2.

—— Jury—Fees—Liability of solicitor for 551
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—— Land Commission—Fair rent agreements—Irregularity—Taking off file - 557
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—— Matrimonial suit — Compromise — Order for payment of costs to petitioner's solicitor [128
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—— Motion for judgment—Action to recover possession of land — Derivative title of plaintiff - - - - - - 45
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—— Parties — Joinder of defendants — Separate causes of action—Damages 486, 494
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—— Staying proceedings—Action to recover possession — Land Law (Ireland) Act, 1881, s. 5; s. 13; sub-s. 4 - - 48
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—— Staying proceedings—Campbell's Act—Two actions in respect of same death 123, 127
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PROMISSORY NOTE—Renewal—Loan Fund Society - - - - - 119, 554
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PURCHASE OF HOLDING BY TENANT — Joint application for advance — Death of landlord — Subsequent sanction of advance - - - - - 561, 591
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RATES — *Exemption — Property "dedicated to or used for public purposes"—Sligo Harbour Commissioners—Poor Law (Ireland) Act*, 1838 (1 & 2 *Vict. c.* 56), *s.* 63—*Valuation Acts*, 1852 *and* 1854 (15 & 16 *Vict. c.* 63, *sections* 15, 16; 17 & 18 *Vict. c.* 8, *sect.* 2)—*Statute, interpretation of—Supreme Court of Judicature (Ireland) Act*, 1897 (60 *Vict. c.* 17).] The Commissioner of Valuation having included the property of the Sligo Harbour Commissioners in the revised lists of rateable property for the year 1896, the Commissioners appealed to the County Court Judge of Sligo, who allowed the appeal, but, at the request of the Commissioner of Valuation, stated a case for the opinion of the Queen's Bench Division. The Sligo Harbour Commissioners were incorporated by that name by the Sligo Borough Improvement Act, 1869 (32 & 33 Vict. c. cxlvii., local), s. 24, and the harbour was by the same Act vested in them. This Act was amended by the Sligo Harbour Act, 1877 (40 & 41 Vict. c. xxxv., local), which gave the Sligo Harbour Commissioners powers to acquire lands, to execute works, to levy tonnage duties and rates on goods, and to borrow moneys, which, together with the revenue of the port, were to be applied in erecting and improving the quays, wharfs, and docks, in payment of the working expenses of the Commissioners, in paying the interest on the
RATES—*continued.*
moneys borrowed, in providing the requisite annual instalments or appropriations for paying off the principal thereof, and in maintaining the works of the Commissioners, and generally in improving the port and harbour:—*Held* (affirming the decision of the Queen's Bench Division), that the property of the Sligo Harbour Commissioners was "dedicated to or used for public purposes," and was within the exemption of the Valuation Acts. *Guardians of Londonderry Union* v. *Londonderry Bridge Commissioners* (I. R. 2 C. L. 577) followed. *Commissioner of Valuation* v. *Sligo Harbour Commissioners* - - - - - - APP. 214
REASONABLENESS OF CUSTOM—Building trade—Surveyor's fees - 275
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REFRESHERS — Motion — Costs, party and party - - - - - - 619
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REGULATIONS — Under Pharmacy Acts — Whether *ultra vires* — Apprenticeship — Construction - - - - - 132
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REMITTING ACTION TO COUNTY COURT — *Practice — Slander — Justification.*] The Court will not, when remitting an action for a slander, charging the plaintiffs with an indictable offence, put the defendants on terms not to plead justification in the County Court. *Brown and M'Court* v. *Fay* - - - - - - - Q. B. 232
RENEWAL — Promissory note — Loan Fund Society - - - - - 119, 554
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REPORT—Of valuers—Fair rent - 399
See FAIR RENT. 3.
REPUBLICATION—*Probate—Grant of probate—Will and codicils—Republication of will referred to by date — Codicil not mentioned.*] The testator made a will dated the 21st October, 1895, and a codicil thereto dated the 31st October, 1895. He made a new will, revoking all previous testamentary instruments, on the 18th November, 1896, but he revoked this last-mentioned will by tearing it on the 7th January, 1897. He then (15th January, 1897), made two codicils, one republishing the will of the 21st October, 1895, written on the same sheet of paper as that will, and referring to it as "my above-written will," and the other, stated to be a codicil to the will of the 21st October, 1895, making a few different bequests, but in all other respects confirming the same:—*Held*, that the codicil of the 31st October, 1895, was not republished, and that probate should be granted only of the will of the 21st October, 1895, and the two codicils of the 15th January, 1897. *Burton* v. *Newberry* (1 Ch. D. 234) explained; *Gordon* v. *Lord Reay* (5 Sim. 274) questioned. *French* v. *Hoey* Q. B. (PROB.), 472

RESIDENTIAL HOLDING — *Landlord and tenant — Land Law (Ireland) Acts*, 1881-1896 — *Character of holding — Conversion of agricultural into residential holding.*] Under a fee-farm grant, dated in 1858, an owner of landed property took agricultural land, situate in the centre of a hunting and fishing district, for the purpose of building a residence, which he subsequently did. The grant contained no reference to this purpose :—*Held*, that the character and user of the holding had been mainly residential, and that the agricultural holding had been converted into a residential holding. *Massy, Grantee ; Webb, Grantor* LAND COM. 615

2. —— *Landlord and tenant — Land Acts*, 1881, 1887—*Villa residence—Non-agricultural holding—Two dwelling-houses on a holding — Separation of holding—Land Law Act*, 1896, *sect.* 5, *sub-sect.* 2.] By lease dated the 16th August, 1859, *G.* demised to *D.* for three lives a holding comprising 123 acres statute, subject to the rent of £199 4*s.* 10*d.* There were two houses on the holding, which was situate about 3 or 4 miles from Limerick. On the 4th March, 1871, *D.* demised to *S.*, a merchant in Limerick, one of the houses, Willow Bank, with a garden and curtilage, comprising two acres, which was occupied as a residence. On the 28th January, 1881, *S.* made a sub-lease of Willow Bank to *P.*, who expended £1600 on the building, prior to the passing of the Land Low Act, 1881, and made it a handsome villa residence. On the application of *R.*, who was assignee of the interest of *D.*, a Sub-Commission fixed a fair rent :—*Held* by the Land Commission, that the letting comprising Willow Bank and the two acres could not be separated from the rest of the holding without diminishing the value of the landlord's interest, and that as the holding comprised a handsome villa residence, the originating notice should be dismissed :—*Held*, by the Court of Appeal :—(1) that the holding could not be separated without injury to the rest ; but (2) (reversing the decision of the Land Commission), that a fair rent should be fixed for the whole. *Gloster, Landlord ; Ryan, Tenant* - - LAND COM. 174 ; APP. 179

REVOCATION—Will—Codicil — Republication
See REPUBLICATION. [472

RIGHT OF ACTION — Accrual — Gift over subject to money payment - 344
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SECURED CREDITOR—Proof — Bankruptcy —Abandonment of security in previous arrangement matter - - 112
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SERVANT.
See MASTER AND SERVANT.

SERVICE—Notice of default—59 & 60 Vict. c. 26 - - - - - 209
See POLICY OF INSURANCE.

SERVICE OUT OF THE JURISDICTION—*Contract alleged to be made in Ireland with agent—Construction—Motion to set aside the order — Order XI., Rule* 1.] The plaintiff entered into a contract with a steamship company in Ireland for the through carriage of certain live stock from Londonderry to York. The carriage necessitated the live stock being taken to Liverpool, and thence by two lines of railway to their destination :—*Held*, on the construction of the contract and on the facts, that there were three independent contracts with the steamship company and the two railway companies ; that the contracts with the railway companies were made and to be performed in England ; and that, consequently, an order giving leave to issue and serve a writ out of the jurisdiction, in an action for a breach at York of one of these contracts, could not be maintained, and should be discharged. *M'Gettigan* v. *North Eastern Railway Company of England* Q. B. 375

2.—— *Interpleader summons—Leave to issue and serve out of the jurisdiction — Ord. XI., R.* 10 ; *and Ord. LXXXVI., R.* 1.] The Court has power to, and will in a proper case, give leave to issue and serve an interpleader summons out of the jurisdiction, although no writ has been sued out against the applicant in relation to the subject matter of the proposed interpleader proceedings. *City of Dublin Steam Packet Company, Applicants ; Cooper and others, Respondents* - Q. B. 381

3. —— *Order of Court of Appeal, giving leave to serve writ out of jurisdiction — Motion to set aside order — Where application to be made.*] Where the Court of Appeal makes an order *ex parte*, giving the plaintiff leave to issue and serve a writ out of the jurisdiction, an application to set that order aside is properly made to the Divisional Court. *Johnston* v. *Stoddart* - - Q. B. 233

SHERIFF—Fi. fa.—*Execution—Sheriff's fees, bailiff's and keeper's charges and expenses—Seizure withdrawn by the authority of the person who required the writ to be executed—Order LXV., Rule* 90—*Appendix S, Part IV.*] Where a sheriff, after a seizure of the execution debtor's goods under a writ of *fi. fa.*, withdraws from possession by the authority of the person at whose instance he was required to execute the writ, he is entitled to bailiff's fee for executing the warrant, and bailiff's expenses while in possession of the goods. A writ is executed when the goods of the execution debtor are *in custodia legis*. *Pirie* v. *Stewart*
[KENNY, J., 546

—— *Fieri facias.*
See FIERI FACIAS.

SHIP—Discharge of cargo—Charter party—Custom of port of Dublin - - 1
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SHIP—*continued.*
—— Marine insurance—Damage to cargo by perils of the sea—Total loss—Notice of abandonment - - - - - - 257
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SLANDER—Remitting action to County Court—Justification - - - - - 232
See REMITTING ACTION TO COUNTY COURT.

SOLICITOR—*Practice—Divorce, petition for, by wife—Compromise—Taxation of costs of petitioner—Payment of costs to solicitor—Form of order.*] A petition for divorce was presented by a wife, and an application instituted for the usual order for the taxation of her costs. Before the hearing of the application a settlement was made by the petitioner without the knowledge of her solicitor, and she returned to cohabitation with her husband. The Court, on the application of the solicitor for the petitioner, made an order for the taxation of the costs of the petitioner, and for payment of the amount of the taxed costs to the solicitor. *Ballance* v. *Ballance* - - - Q. B. (MAT.) 128
—— Liability for jury fees - - - 551
See JURY.

SPECIALLY INDORSED WRIT—*Action for recovery of lands for non-payment of rent—Devolution of title—R. S. C. I., Orders II., R. 8, and III., Rules 6 and 6 (A).*] In an action for the recovery of lands for non-payment of rent, where there is an existing lease, but neither the plaintiff nor the defendant is an original party to it, it is not necessary in a special indorsement of the writ of summons under Ord. III. R. 6 (A) of the Rules of the Supreme Court (Ireland), March, 1897, to set out the devolution of the title of the plaintiff or defendant from the original parties to the lease. *Burgess & Others* v. *M'Craith*, (1894 No. 53, unreported) followed. *Rochfort* v. *Somers* Q. B. 45

2. —— *Motion for judgment — Amendment of claim indorsed on writ without altering the sum claimed for costs—Order III., R. 7, and Order LXXXIV., R. 2—Cross-motion to set aside the writ as irregular.*] Where the claim on a specially indorsed writ is amended by reducing the amount claimed, but the sum claimed for costs is not correspondingly amended, and is thereby excessive, the writ is still a good specially indorsed writ for the purposes of a motion for judgment, and will not be set aside as irregular. *Tatlow* v. *Byrne* [Q. B. 196

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STATUTES:—
2 Wm. 4, c. 17—Subletting, s. 2 - - 299
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3 & 4 Wm. 4, c. 27—Limitations, ss. 3, 4 344
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7 Wm. 4 & 1 Vict. c. 25—Dublin Police District
See CRUELTY TO CHILDREN. [310
1 & 2 Vict. c. 56—Poor Law, s. 63 - - 214
See RATES.
6 & 7 Vict. c. 91—Loan Fund - 119, 554
See LOAN FUND SOCIETY. 1, 2.
8 Vict. c. 18—Lands Clauses, ss. 34, 63 - 305
See COMPULSORY PURCHASE.
9 & 10 Vict, c. 93—Lord Campbell's Act 123, 127
See CAMPBELL'S (LORD) ACT.
15 & 16 Vict. c. 63—Tenement Valuation, s. 16
See RATES. [214
17 Vict. c. 8—Tenement Valuation, s. 2 - 214
See RATES.
19 & 20 Vict. c. 102—Common Law Procedure, s. 14 - - - - - - 234
See ARBITRATION.
20 & 21 Vict. c. 60—Bankruptcy and Insolvency, s. 267 - - - - 313, 322
See BANKRUPTCY.
—— —— s. 313 - - - - - - 206
See BILL OF SALE.
26 & 27 Vict. c. 114—Fisheries, s. 40 - 21
See FISHERY ACTS.
27 & 28 Vict. c. 95—Amendment of Lord Campbell's Act - - - 123, 127
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33 & 34 Vict. c. 46—Irish Land, s. 70 - 504
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34 & 35 Vict. c. 31—Trades Unions, s. 3 667, 744
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34 & 35 Vict. c. 65—Juries, s. 37 - - 551
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37 & 38 Vict. c. 57—Limitations, s. 8 - 163
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40 & 41 Vict. c. 57—Judicature, s. 53 - 344
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—— —— s. 13, sub-s. 4 - - - 48
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—— —— s. 24 - - - - 561, 591
See CONVERSION OF ESTATE.
46 Vict. c. 7—Bills of sale, ss. 7, 15 - 206
See BILL OF SALE.
46 & 47 Vict. c. 43—Tramways and Public Companies, s. 6 - - - - 360
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48 & 49 Vict. c. 73—Purchase of land, ss. 2, 3
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50 & 51 Vict. c. 33—Land Law, s. 8 - 41
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51 & 52 Vict. c. 64—Libel - - 486, 494
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57 & 58 Vict. c. 41—Cruelty to children, s. 19 310
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59 & 60 Vict. c. 26—Collecting Societies and Industrial Assurance Companies - 209
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SUBDIVISION—*Land Law (Ireland) Act*, 1896, *sect.* 5, *sub-sect.* 3—*Joint tenants or tenants in common—Unity of possession.*] The words "joint tenants or tenants in common" in the Land Law (Ireland) Act, 1896, sect. 5, sub-sect. 3, must receive a strictly legal construction, and consequently, where a holding has been subdivided between a number of tenants who have not, and never have had, any privity of estate, title, possession, occupation, or interest, the Court has no jurisdiction to fix a fair rent upon the respective portions of the holding separately occupied by them. *Riversdale, Landlord; Gethins, Tenant*
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SURRENDER—*Landlord—Middleman—Condition in lease attached to power of surrender—Non-fulfilment of such condition—Right of surrender under Land Law (Ireland) Act*, 1887, *sect.* 8.] A condition attached to a power of surrender in a lease, under which a middleman holds, does not necessarily control or govern a surrender proposed to be made by him under the Land Law (Ireland) Act, 1887, sect. 8; that being a new right of surrender in addition to any other right he may otherwise have possessed under any instrument. *Trench, Middleman; Daly, Landlord* - LAND COM. 41
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TAXATION OF COSTS—*Motion—Three counsel—Fee for settling affidavits—Consultation—Discretion of Taxing Master in reducing fees paid.*] There is no rule preventing the allowance of three counsel as between party and party on a motion in this Division. On an unsuccessful motion to set aside an award, disallowing a large portion of the claim which was the subject of arbitration, on the grounds of miscarriage in procedure and personal misconduct on the part of two out of three arbitrators, and the arguments on which occupied two days, the Court allowed, as between party and party, three counsel and the settlement of affidavits by senior counsel, but disallowed a consultation for that purpose, and refused, under the special circumstances of the case, to interfere with the discretion of the Taxing Master in reducing considerably the fees actually paid to counsel on their briefs. *In re Corless* - - - - - - Q. B. 29

2. —— *Motion — Three counsel — Refreshers.*] Where a motion is of a serious character, and involves difficult questions of law, three counsel will be allowed, as between party and party. On a motion to stay an action and refer the matters in dispute to an arbitrator, on the ground that they came within a clause in a contract agreeing to refer the matters in dispute between the parties in the settlement of the accounts to arbitration, the Court allowed, as between party and party, three counsel and refresher fees. *Workman* v. *Belfast Harbour Commissioners* - - - - Q. B. 619
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TENANTS IN COMMON—Subdivision of holding—Land Law (Ireland) Act, 1896, sect. 5, sub-sect. 3 - - - - 81, 88
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TRADE UNION—Malicious interference with employees—Conspiracy - 667, 744
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TRAMWAY—*Baronial guarantee—Treasury subvention—Certificate of arbitrators under Tramways (Ireland) Act*, 1883—*Excess of jurisdiction—Error in certificate—Grand Jury—Presentment—Fiat of Judge of Assize*—Certiorari—*Tramways (Ireland) Act*, 1883 (46 & 47 *Vict. c.* 43), *sect.* 6.] The Grand Jury of the county of Mayo made a presentment guaranteeing a certain dividend on the share capital (£98,000) of a certain Light Railway Company, the undertaking to be worked by the W. & L. Railway Company, who were to retain 50 per cent. of the gross profits, and pay the other 50 per cent., or as a minimum, £51 a week to the new Company. The guarantee was not to commence to accrue until the undertaking was fully completed, taken over, and opened for traffic. The presentment was ratified by Order in Council, and confirmed by statute (54 Vict. c. i.), by which a subvention from the

TRAMWAY—*continued.*
Board of Works was guaranteed in case of the county. The line was opened for traffic on the 1st May, 1894, but, upon the ground that the undertaking was not fully completed, the arbitrators (appointed by the Board of Trade under sect. 6 of the Tramways (Ireland) Act, 1883) made no certificate for the half-years ending 31st October, 1894, and 30th April, 1895. On the 20th December, 1895 (the undertaking having been meanwhile fully completed), the arbitrators made up their first certificate for the half-year ending 31st October, 1895, and therein included under expenditure payments (£819 13*s.* 9*d.*), which, though actually made during that half-year, were in respect of liabilities incurred in the two preceding half-years (though they only took into account the gross receipts of the particular half-year), and, as the result certified to a partial insufficiency of net receipts to meet dividend of £1773 19*s.* 2*d.* The Grand Jury presented and levied this sum in 1896 (the presentment being fiated without opposition), and applied to the Board of Works for their subvention of a moiety of this amount. Investigation disclosing the error, the Board refused to contribute more than a moiety of the lesser amount (£1773 19*s.* 2*d.* less £819 13*s.* 9*d.*) This the Grand Jury declined to accept, and a Petition of Right was presented by the Secretary and Solicitor of the Grand Jury, praying for payment of moiety of the amount certified and presented for from the Treasury without any deduction. At the trial judgment was entered in favour of the suppliants. The Crown obtained a writ of *certiorari* to remove the certificate and presentment into Court. On motion for a new trial of the petition, and argument on the return to the writ, the majority of the Queen's Bench Division held (*diss.* Palles, C.B.) that the certificate, with the presentment founded thereon, should be quashed, and that judgment should be entered for the suppliants for the less amount:—*Held* (reversing the decision of the Queen's Bench Division), that the suppliants were entitled to judgment for the full amount claimed. *Kelly* v. *Reg.*; *In re Attorney-General and Grand Jury of County of Mayo* - - - APP. 360

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WASTE—*Landlord and tenant—Breach of statutory conditions of tenancy—"Persistent waste"—Ejectment—Staying proceedings—Land Law (Ireland) Act*, 1881 (44 & 45 *Vict. c.* 49), *sect.* 5; *sect.* 13, *sub-sect.* 4.] The plaintiff served a notice to quit on the defendant, his tenant from year to year under a "fair rent" order, for breach of one of the statutory conditions of his tenancy, waste by dilapidation of buildings, and instituted an action to recover possession of the holding. The defendant, who admitted waste, but alleged that any dilapidations had been repaired prior to the issue of the writ, moved to stay the action. The Court ordered that the action should be stayed on the terms of the defendant paying the costs of the notice to quit (£1 1*s.*), and the costs of the motion (£5 5*s.*). *Hamilton* v. *Black* - - - - - Q. B. 48

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